Supreme Court, U.S.
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No. 90-1935

In The

Supreme Court of the United States

October Term, 1990

NORMAN WILLIAMS AND SUSAN LEVINE,

Petitioners,

v.

STATE OF VERMONT AND WILLIAM H. CONWAY, JR., COMMISSIONER, VERMONT DEPARTMENT OF MOTOR VEHICLES,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Vermont

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Vermont supreme court improperly dismiss petitioners' complaint on the pleadings, after this Court held that it stated a cause of action under §1983 and remanded for a factual determination?

2. Are taxpayers who have been forced to pay unconstitutional state taxes entitled to seek a refund or other equitable relief under §1983 or the Fourteenth Amendment?

3. May states, consistent with the Due Process Clause, require taxpayers to litigate constitutional tax challenges before an administrative agency where no right to a hearing, to procedural safeguards, or to judicial review exists?

4. Does a state sales and use tax which fails to grant a use tax credit for sales taxes paid to other states violate the Commerce Clause?

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Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Vermont

PETITION FOR WRIT OF CERTIORARI

Norman Williams and Susan Levine respectfully petition for a writ of certiorari to review the judgment of the Vermont supreme court in this case.

OPINIONS BELOW

The opinion of the Vermont supreme court on remand (App., 1a-23a) is reported at 2 Vt.L.W. 47 (Feb. 27, 1991). The opinions of the state superior court on remand (App., 31a-34a and 35a-46a) are not reported.

JURISDICTION

The judgment of the Vermont supreme court was entered on November 9, 1990. (App., 48a). A timely motion for reargument was denied on February 1, 1991. (App., 47a). On April 22, 1991, Justice Marshall issued an

order extending the time for filing a petition for a writ of certiorari to and including June 17, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Equal Protection Clause of the Fourteenth Amendment provides:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

2. The Due Process Clause of the Fourteenth Amendment provides:

> [N]or shall any State deprive any person of life, liberty or property, without due process of law. . . .

3. The Due Process and Taking Clauses of the Fifth Amendment provide:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

4. The Commerce Clause of the United States Constitution provides:

> The Congress shall have Power . . . To regulate Commerce . . . among the several States . . .

5. The Supremacy Clause of the United States Constitution provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

6. Section 1983 of title 42, United States Code, provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of

any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

7. Vt. Stat. Ann. tit. 23, §§105 and 106, and tit. 32, §§8903, 8905, 8911(9) and 8914.

[The text of these statutes are set forth in the Vermont Statutes Annotated and the 1990 supplements thereto. A copy of the statutes is reprinted at pages 62a-64a of the Appendix.]

STATEMENT

1. *Summary*. The State of Vermont charges all new residents a four percent purchase and use tax on their cars, without granting a credit for sales taxes paid elsewhere. On June 4, 1985, this Court held that that tax violates the Equal Protection Clause on its face. In remanding, it ruled that petitioners had stated a cause of action under §1983 and that the tax could be salvaged only by a factual determination that it was not administered as written. *Williams v. Vermont*, 472 U.S. 14.

The Vermont courts never made such a determination. Rather, the Vermont supreme court ruled that, after remand, the complaint no longer stated a cause of action. Accordingly, it dismissed the case for a second time and allowed the statute to stand. The court ruled that petitioners' only recourse after remand was to file a second request for administrative relief with Respondent Conway, even though: 1) such a request was filed and denied at the outset; 2) no right to an administrative hearing, procedural safeguards, or judicial review exists; and 3) Respondent Conway stated to the Vermont supreme court in writing that such a request would be futile. (App., 49a).

2. *Factual Background*. As stated in the amended complaint and summarized in the decision below, (App., 2a-5a), Petitioner Williams commenced this case after paying, under protest, a Vermont motor vehicle purchase and use tax of $172 to Respondent William Conway, the Vermont Commissioner of Motor Vehicles, on August 27, 1982.[1] That amount represented four percent of the value of his car, a 1980 Volkswagen "Dasher." He had purchased the car in Illinois on December 10, 1980. At the time of purchase, he paid a five percent Illinois sales tax.

Petitioner Williams brought the car with him when he moved to Vermont on February 1, 1981. Before the Illinois registration and license plates expired, he applied for a Vermont registration on October 22, 1981. However, a clerk at the Vermont motor vehicle department informed him that he would have to pay a four percent "purchase and use" tax on the car, despite the fact that he had already paid a five percent sales tax in Illinois. No credit for the Illinois tax would be granted. Petitioner Williams declined to pay the tax on grounds that it was unconstitutional. Absent payment, the department and Respondent Conway refused to register the car. (App., 2a).

3. *Preliminary Proceedings*. Petitioner Williams filed an action in Vermont federal district court on November 3, 1981, seeking a declaratory judgment that the motor vehicle purchase and use tax was unconstitutional. He argued, *inter alia*, that the tax violated the Equal Protection Clause because it gave Vermont residents a credit for sales taxes paid on automobiles purchased in "reciprocal" states but denied such a credit to non-residents. Respondents argued that the case should be dismissed under the Tax Injunction Act, 28 U.S.C. §1341, because a "plain,

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[1] By paying the tax, Petitioner Williams avoided substantial civil and criminal penalties, as well as the revocation of his driver's license. *See* Vt. Stat. Ann. tit. 32, §§8920 (interest plus 25 percent civil penalty); 8909 (driver's license suspension); tit. 23, §421 (criminal sanctions).

speedy, and efficient remedy" existed under state law, in the form of a tax refund request under Vt. Stat. Ann. tit. 32, §8914. The district court dismissed the case on June 30, 1982, following this Court's decision in *California v. Grace Brethren Church*, 457 U.S. 393 (1982), that declaratory relief actions are barred by section 1341.

Petitioner Williams then paid the tax to Respondent Conway and filed an administrative tax refund request under Vt. Stat. Ann. tit. 32, §8914 with the Vermont motor vehicle department and Respondent Conway. He again asserted that the tax violated the Equal Protection Clause. In findings of fact and a decision dated October 26, 1982, a motor vehicle department hearing officer ruled that the department could not decide constitutional issues and denied the refund. (App., 2a, 24a-28a).

4. *State Court Action.* Petitioner Williams filed this action in Vermont state superior court on November 22, 1981, seeking a tax refund and declaratory judgment that the motor vehicle tax was unconstitutional under the Equal Protection Clause, the Privileges and Immunities Clause, and the Commerce Clause. He also asserted state law causes of action.[2] In lieu of answering, respondents moved to dismiss for failure to state a claim on December 23, 1982. (App., 3a).

5. *Petitioner Levine.* Petitioner Susan Levine moved to intervene as a party-plaintiff on January 23, 1983, before any judgment in the case was rendered, and an amended complaint stating the claims of both Petitioners was submitted. (App., 3a). Petitioner Levine had moved to Vermont from Saranac Lake, New York, in November, 1979. She brought with her a 1979 Chrysler Horizon purchased on September 29, 1978, in Saranac Lake. At the

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[2] Because no statutory right of appeal exists with respect to motor vehicle tax refund claims, Rule 75 of the Vermont Rules of Civil Procedure directs litigants seeking review to file an original action in the Superior Court, as Petitioner Williams did. Rule 75 is merely procedural; it neither establishes nor restricts a litigant's right to judicial review.

time of purchase, she had paid a seven percent New York sales tax, or $344.64. *Id.*

On December 16, 1982, and before expiration of her New York registration, Petitioner Levine presented a completed Registration Tax and Title Application to the Vermont Motor Vehicle department. Based on a "low book" value of $2,750, the department assessed, and Petitioner Levine paid, a four percent "use" tax to Vermont of $110. (App., 3a). The Vermont superior court granted Petitioner Levine's motion to intervene on January 26, 1983.

6. *Superior Court Decision.* On February 24, 1983, the Vermont superior court dismissed the action on the pleadings. It found that the motor vehicle purchase and use tax did discriminate on the basis of residency. However, it concluded that such discrimination was "rationally related" to the cost of maintaining state highways and therefore did not violate the Equal Protection Clause. It applied the same "rational basis" test in concluding that the statutory scheme did not violate the Privileges and Immunities Clause. Finally, the superior court ruled that no "discrimination against interstate commerce" had been "demonstrated" and dismissed petitioners' claim under the Commerce Clause as well.

7. *Vermont Supreme Court.* The Vermont supreme court affirmed on June 15, 1984, in a one-line memorandum decision referencing *Leverson v. Conway,* 144 Vt. 523, 481 A.2d 1029 (1984), a similar case decided the same day.[3] There the Vermont supreme court concluded that the motor vehicle tax met the "rational basis" test under the Equal Protection Clause and that neither the Privileges and Immunities nor Commerce Clauses were implicated.

8. *United States Supreme Court.* This Court reversed on June 4, 1985, holding that petitioners had stated a

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[3] *Leverson* was vacated and remanded by this Court on June 17, 1985. 472 U.S. 1014.

cause of action under 42 U.S.C. §1983. 472 U.S. at 15, 27-28. It agreed that Vermont's failure to grant a tax credit to petitioners "denies them the equal protection of the laws." *Id.* at 15. As it said: "A State may not treat those within its borders unequally solely on the basis of their different residences." *Id.* at 23.

Based on its disposition of the case under the Equal Protection Clause, the Court did not reach petitioners' Commerce Clause or Privileges and Immunities Clause claims. It did note, however, that there was significant support for the Commerce Clause claim in the case law and commentary. 472 U.S. at 21-22. In a brief concurrence, Justice Brennan stated his view that the state tax statute also "clearly, though indirectly, threaten[s] the 'federal interest in free interstate migration.' " *Id.* at 28 (*quoting Zobel v. Williams*, 457 U.S. 55, 65 (1982)).

In their brief and oral argument to this Court, respondents asserted that state residents were not in fact granted a credit under the motor vehicle tax statute. The Court expressed skepticism at this assertion. It pointed out that the Vermont supreme court did not appear to have construed the statute that way, and that such a reading was difficult to reconcile with the statutory tax scheme as a whole. 472 U.S. at 19-21. Nevertheless, it emphasized that "[t]he 'dominant theme running through all state taxation cases' is the 'concern with the actuality of operation.' " *Id.* at 28 (*quoting Halliburton Oil Well Co. v. Reily*, 373 U.S. 64, 69 (1963)). Accordingly, it concluded: "It is conceivable that, were a full record developed, it would turn out that in practice the statute does not operate in a discriminatory fashion." *Id.* It then remanded "for further proceedings not inconsistent with this opinion." *Id.*

9. *Vermont Supreme Court Order After Remand.* On remand, the Vermont supreme court ordered both parties to "show cause . . . why this matter should not be remanded to the trial court for further proceedings in consonance with the decision of the Supreme Court of the United States." (App., 29a). Respondents pointed to a

regulation promulgated shortly after this Court's ruling which prohibited Vermont residents who registered cars in reciprocal states from obtaining a tax credit. *See* App., 4a, n.3 (explaining regulation). They urged the state supreme court to adopt that construction of the tax statute and dismiss petitioners' facial challenge as moot. However, respondents agreed that petitioners should be given an opportunity to prove that the tax had in the past been administered in an unconstitutional manner. Petitioners, by contrast, argued that the court should construe the tax statute as written and grant the relief sought or, absent a definitive interpretation, remand for a factual determination as to how the tax had in fact been administered. On September 9, 1985, the Vermont supreme court remanded the case to the superior court "for further proceedings not inconsistent with the opinion of the U.S. Supreme Court." (App., 30a).

10. *Superior Court After Remand.* Respondents filed an answer on September 12, 1985, and discovery was commenced. Shortly thereafter, petitioners located two Vermont residents, Rodney Gabree and John Hibbard, who had registered their cars in other states and received a tax credit, just as the tax statute requires. *See* App., 50a-53a (deposition excerpts of Rodney Gabree); 54a (departmental memo regarding John Hibbard). Moreover, the supervisor in charge of administering the tax, Harold Cone, as well as two motor vehicle inspectors working under him, Dean Martin and Lewis Theriault, testified that during the time in question they had indeed granted tax credits to Vermont residents who purchased, paid tax, and registered cars in reciprocal states, just as the tax statute directed. *See* App., 55a, 56a, 57a-59a (deposition excerpts). Petitioners also learned in discovery that respondents were continuing to deny non-resident refund requests without providing a hearing. *See* App., 60a (sample letter of reply from Respondent Conway to refund request).

On February 17, 1986, respondents filed a second motion to dismiss, asserting for the first time that petitioners had failed to state a cause of action because neither the state nor Respondent Conway was a "person" within the meaning of 42 U.S.C. §1983. (App., 3a). Shortly thereafter, respondents also asserted that the state enjoyed sovereign immunity from constitutional tax refund claims and that the request for declaratory relief had been rendered moot by their new regulation.

On December 18, 1986, the trial court judge recused himself without ruling on the second motion to dismiss. Another judge was appointed and respondents requested an "expedited" ruling on their motion to dismiss. At respondents' urging, the court stayed discovery pending a decision on the motion. On May 6, 1987, it found that petitioners had stated a cause of action under 42 U.S.C. §1983 and denied the motion to dismiss. (App., 31a-34a). However, respondents immediately moved for reconsideration and the court at their request continued the discovery stay. A year later, it reversed itself and granted the motion to dismiss on May 3, 1988. (App., 35a-46a). This time, the trial court concluded that petitioners' constitutional tax refund claim was barred by sovereign immunity and that the declaratory relief claim was moot in view of the new regulation. *Id.*

11. *Vermont Supreme Court After Remand.* Petitioners appealed to the Vermont supreme court for the second time on May 16, 1988. At oral argument, the supreme court *sua sponte* raised the issue of exhaustion of administrative remedies for the first time. In a subsequent brief addressing the issue, respondents stated flatly "that requiring the exhaustion of administrative remedies in the context of these particular actions would be futile." (App., 49a).

In an opinion dated November 9, 1990, and reissued with modifications on February 1, 1990, the Vermont supreme court affirmed the dismissal, but on different grounds. It held that, as a result of this Court's ruling that the motor vehicle tax statute was unconstitutional on its

face, petitioners could no longer maintain their suit in state court. (App., 13a-15a). It began by saying that Respondent Conway had properly rejected petitioner Williams's claim initially, since he is not authorized to rule on the constitutionality of state statutes. (App., 13a). Now that the United States Supreme Court had ruled that the statute was unconstitutional on its face, however, the issue was simply one of administration.[4] That question, the court said, was "suited to agency determination." (App., 14a).[5] It then dismissed the suit, holding that petitioners' sole recourse after remand was to file a second administrative request with Respondent Conway. (App., 14a-15a; 17a). The court specifically refused petitioners' suggestion that the suit be *remanded* to the motor vehicle department if that was the appropriate place for a factual inquiry. (App., 47a).

The Vermont supreme court also ruled on remand that petitioners' tax refund claim failed to state a cause of action under §1983, because a state or state official acting in his official capacity is not a "person" within the meaning of that section when monetary relief is sought.[6] (App.,

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[4] The Vermont supreme court passed over the fact that this Court did not and does not construe state statutes, a point it reiterated in *Williams*. 472 U.S. at 21 n.6.

[5] The Vermont supreme court also depicted petitioners' facial attack under the Commerce Clause, which does not depend on how the tax credit is administered, as a question of administration. The issue, it said, was: "If [the Department's enforcement of the credit] did comply with the statute, did the practice violate the Commerce or Privileges and Immunities Clauses?" (App., 13a-14a). But this question is no different from whether the statute violates the Commerce or Privileges and Immunities Clauses on its face, a question which the state court said respondent cannot decide. (App., 13a).

[6] The court assumed that Respondent Conway was being sued only in his official capacity, although the complaint does

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5a-9a). It went on to deny petitioners' claim for a refund directly under the Fourteenth Amendment, rejecting a series of decisions of this Court providing such relief. (App., 8a, n.7). It concluded: "none of these cases expressly provide a right of action directly under the Constitution" and "all these cases long predate the development of modern §1983 law." *Id.*[7]

The supreme court did acknowledge that Vermont was constitutionally required to provide a remedy for unlawful taxes under *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 110 S. Ct. 2238 (1990). In so ruling, it reversed the superior court and its own prior decision in *American Trucking Assns. v. Conway*, 146 Vt. 579, 508 A.2d 408 (1986), which held that the state could refuse to refund unconstitutional taxes on sovereign immunity grounds. However, it concluded that an administrative hearing before the motor vehicle department was all that *McKesson* required. (App., 11a-16a).

Finally, the Vermont supreme court held that petitioners also were not entitled to declaratory relief under

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not so state. (App., 4a). As in federal practice, however, Rule 12, V.R.Civ.P., requires all doubts raised by the pleadings to be construed against the moving party for purposes of a motion to dismiss.

[7] In an aside, the court said it would discuss respondents' right to assert sovereign immunity on remand "[a]ssuming the complaints also rest on state causes of action (although they are designated solely as §1983 actions)." (App., 8a-9a). However, petitioners' state law claims had been dismissed by the Vermont Supreme Court in its first decision on June 15, 1984. The court nonetheless concluded that respondents were free to assert sovereign immunity as an affirmative defense to such claims on remand. (App., 10a-11a). The court failed to address petitioners' argument that respondents were precluded from seeking dismissal for failure to state a cause of action under §1983 or the Fourteenth Amendment for a second time on remand, however.

§1983. (App., 17a-23a). First, it said, the Vermont Declaratory Judgment Act does not expand the court's jurisdiction beyond what is already authorized by the legislature. Here, the legislature has restricted tax refund claims to the motor vehicle department. (App., 18a-19a). Severed from the refund claim, the court continued, the petitioners' request for declaratory relief does not provide a justiciable controversy, since petitioners are unlikely to be denied a tax credit again. (App., 20a-22a). In response to petitioners' argument that administrative remedies need not be exhausted prior to seeking declaratory relief under §1983, the court said in its opinion of November 9, 1990, that that rule applies only in federal court.

Petitioners filed a timely motion for reargument on November 26, 1990. Among other things, they asserted that the administrative exhaustion requirement imposed by the court conflicts with *Felder v. Casey*, 487 U.S. 131 (1988). Without agreeing that constitutional tax refund actions are foreclosed under §1983 or the Fourteenth Amendment, petitioners also argued that declaratory actions are available even where tax refunds are not. Finally, petitioners suggested that if the court wanted the motor vehicle department to make a factual determination, it should have remanded the action there rather than dismissing it outright. At least, petitioners concluded, the court should clarify what statute of limitations applies with respect to refund claims filed with the department.

On February 1, 1991, the Vermont supreme court denied petitioners' motion for reargument in all respects. (App., 47a). It declined to remand the action to the motor vehicle department or to clarify what statute of limitations applied. However, the court did "delete[] certain references in the opinion to exhaustion of remedies; that doctrine plays no role in our decision." *Id.*[8]

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[8] In fact, the court eliminated the final two pages of its initial slip opinion entirely.

REASONS FOR GRANTING CERTIORARI

Review is required to insure that this Court's decision in this case is given effect and to resolve important constitutional issues raised by the Vermont supreme court's second dismissal. This Court ruled in this case that Vermont's motor vehicle tax violates the Equal Protection Clause, absent an evidentiary showing that it is not administered as written. Without even looking at that issue, the state supreme court dismissed the case on the pleadings for a second time, five years after the remand. It concluded that, after this Court's ruling, the state courts no longer had jurisdiction under §1983 or the Fourteenth Amendment. Meanwhile, respondents continue to collect the challenged tax in the amount of $1 million annually. *See* App., 60a-61a.

In dismissing, the Vermont supreme court raised issues of constitutional and federal law which go well beyond the state tax statute in question. The first is whether actions for declaratory relief or tax refunds are available under §1983 or the Fourteenth Amendment at all. This Court has noted that the issue is difficult, and the state courts are deeply divided. The Vermont supreme court read *Will v. Michigan Dept. of State Police*, 109 S. Ct. 2304 (1989), to preclude tax refund actions under §1983, even though *Will* involved legal damages rather than a tax refund. It also held that petitioners' declaratory relief claim was moot, despite rulings by this Court that constitutional tax challenges cannot be rendered moot by tax law amendments or by the unavailability of a refund after the litigant has paid. Finally, the Vermont supreme court rejected a series of decisions of this Court suggesting that relief for unconstitutional taxes is available directly under the Fourteenth Amendment.

Even if a judicial cause of action for unconstitutional state taxes is not available, this Court should accept review to establish minimum due process requirements in such cases. This Court has made clear that individuals may not be deprived of property without fair procedures

and a meaningful hearing, and only last term it reaffirmed that this rule applies to state taxes. However, it has never had occasion to specify those procedures in a case challenging unconstitutional state taxes. Whatever the minimum requirements may be, the administrative remedy provided by Vermont falls short of the mark. It leaves Respondent Conway to decide whether to hold a hearing and, if he does, whether to permit discovery or enforce any evidentiary or procedural rules. No statute of limitations is set forth, and judicial review is left to the discretion of the courts. In view of the fact that Petitioner Williams tried and failed to obtain an administrative remedy before initiating this action; that Respondent Conway has conceded that further attempts would be futile; and that other non-resident taxpayers seeking administrative refunds have been refused without a hearing, it is hard not to conclude that the remedy is meaningless.

The final constitutional question raised involves the continued illegality of Vermont's motor vehicle tax under the Commerce Clause. This Court made clear that the state's failure to grant a compensating use tax credit for sales taxes paid to other states raises serious doubts on that score. 472 U.S. at 21-22. Subsequent decisions by this Court confirm and strengthen such doubts. The instant case squarely presents this important but unsettled issue.

I. REVIEW IS REQUIRED TO INSURE THAT THIS COURT'S EARLIER DECISION AND MANDATE ARE PUT INTO EFFECT.

This case merits close attention to insure that this Court's earlier decision and mandate are carried out and that petitioners' federal rights are protected. This Court has repeatedly recognized its important supervisory role in our nation's judicial system. *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950); *Walling v. Reuter, Inc.*, 321 U.S. 671 (1944). It has refused to let inadequate state procedures or remedies frustrate federal rights. *See, e.g., Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, 488 U.S. 336, 346 (1989) (inadequate state

remedy for unconstitutional property taxes); *Burnett v. Grattan*, 468 U.S. 42 (1984) (administrative limitations statute not controlling in state court §1983 action); *American Trucking Association, Inc. v. Gray*, 483 U.S. 1306 (1987) (Blackmun, J. in chambers) (ordering state tax escrow pending U.S. Supreme Court review of Commerce Clause claim); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (state employment claims procedure violated due process); *Brown v. Western Railway Co. of Alabama*, 338 U.S. 294 (1949) (state rule of practice could not deprive plaintiff of federal rights).

Simply and narrowly put, the Vermont supreme court dismissed the petitioners' §1983 claim in this case for failure to state a cause of action, after this Court had already ruled that it did. Perversely, it concluded that petitioners lost their federal cause of action the moment this Court agreed that Vermont's motor vehicle tax was unconstitutional as written and remanded.[9] More broadly, the state supreme court has allowed a tax statute to stand – and has allowed respondents to continue collecting $1 million a year under it – after this Court has said that it violates the Equal Protection Clause on its face. No state court has ever made the factual determination which this Court said is required to save the tax.

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[9] As illustrated by this case, the ruling presents a simple recipe for frustrating constitutional state challenges. According to the state supreme court, taxpayers requesting administrative tax refunds on constitutional grounds are correctly informed the administrative relief is not available, since state agencies cannot pass on the constitutionality of state statutes. The taxpayers next bring court actions under §1983 or the Fourteenth Amendment challenging the constitutionality of the statute. If and when the taxpayer prevails, the state asserts the statute is not administered as written. The suit then must be dismissed without a factual inquiry. Assuming the (unwritten) statute of limitations has not expired, the state administrative agency then may decide for itself whether it was telling the truth in saying that the tax was not enforced as written.

The "mandate rule" established by this Court in *Ex parte Sibbald*, 13 U.S. (13 Pet.) 488 (1838), and subsequent cases forbids such a result. Under it, the lower court's task is confined to carrying out the letter and spirit of the appellate decision. *See* 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.404[10] (2d ed. 1991 & 1990-91 Supp.). Here, the task was to decide whether the motor vehicle tax was constitutional in practice, not whether the suit could be avoided in other ways. The mandate rule prohibits further litigation of issues included *or includable* in a prior appeal. *Seese v. Volkswagenwerk AG*, 679 F.2d 336, 337 (3rd Cir. 1982).

The mandate rule is grounded not only on the appellate structure of the court system but on basic notions of fair procedure, including the rule that objections and defenses must be raised in timely fashion to be preserved. *See United States v. Atkinson*, 297 U.S. 157 (1936). While that rule restricts the assertion of new objections and defenses on appeal, *see, e.g., Wood v. Sunn*, 852 F.2d 1205 (9th Cir. 1988) (disallowing new §1983 immunity defense on appeal); *Langdon v. Jackson*, 404 F.2d 319 (9th Cir. 1968) (rejecting new §1983 statute of limitations on appeal), it precludes them entirely on remand. As the federal district court put it in *Burt v. Abel*, 466 F. Supp. 1234 (D.S.C. 1979):

> This court does not feel that a party should be provided seriatim appeals, raising on appeal first one issue and then another, until it finds an issue upon which it can prevail, or, as is more likely, until it consumes the judicial resources of the party opponent. While the doctrines of *res judicata* and "law of the case" are useful tools in normal adjudications, these legal principles are especially applicable in this protracted case which has consumed gargantuan portions of judicial time at both the trial and appellate levels.

Id. at 1240.

A number of courts have reached the same conclusion. *See, e.g., Washington Post Co. v. U.S. Dept. of Health and Human Services*, 795 F.2d 205, 209 (D.C. Cir. 1986) (Scalia,

J.) (court in FOIA case "will not require this litigant, contrary to the well established law of this circuit, to overcome newly framed arguments on remand"); *Daly v. Sprague*, 742 F.2d 896, 900 (5th Cir. 1984) ("We did not remand for a reconsideration of the entire controversy").

Here, the arguments on which the state supreme court based its second dismissal were not asserted until after remand and not until three years after respondents' initial motion to dismiss.[10] The case by that time had passed through this Court once and the Vermont supreme court twice. After the second motion to dismiss was filed, the state court cut off further discovery, thus limiting petitioners' ability to prove a constitutional violation if they ever do get a hearing.[11]

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[10] In its initial motion filed December 23, 1982, respondents argued only that the Vermont motor vehicle tax was constitutional. In their second motion on February 17, 1986, respondents asserted for the first time that petitioners failed to state a claim under §1983 because Respondent Conway was not a "person" thereunder. By the time the second dismissal was granted on May 3, 1988, petitioners had developed strong evidence that the motor vehicle tax was in fact administered just the way it was written – to give Vermont residents who registered their cars in other states a tax credit. *See* App., 50a-59a. That is contrary to what respondents told this Court.

[11] There can be no question that petitioners' attempt to gather evidence and prove how the motor vehicle tax was administered nine years ago has been prejudiced by the discovery cut-off. At least two individuals directly responsible for administering the tax, Harold Cone and Dean Martin, have left the motor vehicle department. Two Vermont residents who received a tax credit after purchasing and registering their car in another state, Janet and John Hibbard, have left the country and can no longer be reached. Respondents' counsel also has stated that motor vehicle department records showing where vehicles were purchased and registered are destroyed as a matter of practice when registrations lapse or expire or when license plates are transferred to another vehicle.

At a minimum, the Vermont supreme court has taken unusual liberties on remand. It has dismissed a constitutional tax challenge which this Court held stated a cause of action, based on respondents' bare assertion that the tax is not administered as written. It has prevented petitioners from obtaining evidence about the truth or falsity of that representation, while allowing respondents to continue exacting a second sales tax on the automobile of every new resident entering the state. The decision of the Vermont supreme court deserves scrutiny on the narrow but fundamental question of whether, in dismissing, it violated this Court's opinion and mandate, depriving petitioners of their federal rights in the process.[12]

II. THIS COURT SHOULD ACCEPT REVIEW TO DETERMINE WHETHER STATE COURTS MAY REFUSE TO HEAR CONSTITUTIONAL TAX CHALLENGES BROUGHT UNDER SECTION 1983 OR THE FOURTEENTH AMENDMENT.

A. The State Courts Are Divided On Whether Tax Challenges Must Be Recognized Under §1983 Or The Fourteenth Amendment.

Apart from the question of whether it conforms to this Court's mandate, the Vermont supreme court's decision raises far-reaching concerns under the Constitution and federal law. The first is whether 42 U.S.C. §1983 or the Fourteenth Amendment provides a judicial cause of action for constitutional tax challenges. That issue assumes unique importance in the state tax context, since the Tax Injunction Act of 1937 and Eleventh Amendment

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[12] The failure of state courts, including the Vermont courts, to abide by the spirit of this Court's recent constitutional tax rulings is discussed in Tatarowicz, "Right to a Refund For Unconstitutionally Discriminatory State Taxes and Other Controversial State Tax Issues Under the Commerce Clause," 41 Tax Lawyer 103 (1987).

severely limit federal court jurisdiction and remedies.[13] Review will allow this court to resolve a deep split in the state courts on this issue and insure uniform treatment of constitutional state tax claims.

On remand, the Vermont supreme court held that petitioners had failed to state a cause of action under either 42 U.S.C. §1983 or the Fourteenth Amendment. Vermont thus became one of at least nine states refusing to recognize a judicial action for constitutional tax challenges.[14] On the other hand, courts in four states, including two state supreme courts, have concluded that they

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[13] Federal courts are precluded from hearing almost all challenges to state and local taxations by the Tax Injunction Act, 28 U.S.C. §1341 (1982). *See* E. Chemerinsky, *Federal Jurisdiction* §11.3, at 570-76 (1989). This Court has made clear that the act limits not only injunctive relief but also declaratory judgments and damages. *California v. Grace Brethren Church*, 457 U.S. 393, 411 (1982); *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100, 113 (1981). It also has established that the Eleventh Amendment prohibits tax refunds in federal court, absent the state's consent. *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459 (1945).

[14] In six of the other eight states, the decision was handed down by the highest court of the state. The cases are *Zizka v. Water Pollution Control Authority*, 195 Conn. 682, 490 A.2d 509 (1985); *Backus v. Chilivis*, 236 Ga. 500, 224 S.E.2d 370 (1976); *[illegible]n v. DeKalb County Board of Tax Assessors*, 186 Ga. App. 208, 367 S.E.2d 43 (1988) (following *Backus*); *Stufflebaum v. Panethiere*, 691 S.W.2d 271 (Mo. 1985) (*en banc*); *Strain v. Baryla*, No. TSB-H-84(44)S (N.Y. St. Tax Comm'n June 1, 1984) (LEXIS, States library, Alltax file); *Johnston v. Gaston County*, 71 N.C. App. 707, 323 S.E.2d 381 (1984); *Linderkamp v. Bismarck School Dist. No. I*, 397 N.W.2d 76 (N.D. 1986); *Spencer v. South Carolina Tax Commission*, 281 S.C. 492, 316 S.E.2d 386 (1984), *aff'd by an equally divided court*, 471 U.S. 82 (1985); *Davis v. City of Elkhorn*, 132 Wis. 2d 394, 393 N.W.2d 95 (1986).

are obligated to hear such claims, while at least seven others have assumed jurisdiction without discussion.[15]

This Court has recognized the issue but not resolved it. In *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234 n.7 (1987), the Court observed that "[w]hether state courts must assume jurisdiction over [section 1983 suits challenging state taxation] is not entirely clear," and it has twice left open the question of whether state courts must hear §1983 actions at all. *Maine v. Thiboutot*, 448 U.S. 1, 3 n.1 (1983); *Martinez v. California*, 444 U.S. 277, 283 n.7 (1980). In *Spencer v. South Carolina Tax Commission*, 471 U.S. 82 (1985), an equally divided Court affirmed without opinion a state case refusing to exercise jurisdiction over a section 1983 tax claim. *But cf. Dennis v. Higgins*, 59 U.S.L.W. 4117 (February 20, 1991) (§1983 cause of action available for state court Commerce Clause action).[16]

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[15] Courts holding that jurisdiction is mandatory include *Beverly Bank v. Board of Review*, 117 Ill. App. 3d 656, 453 N.E.2d 96 (1983), *cert. denied*, 466 U.S. 951 (1984); *Allison v. Board of County Comm'rs*, 241 Kan. 266, 737 P.2d 6 (1987); *Burrell v. Mississippi State Tax Commission*, 536 So.2d 848 (Miss. 1988) (*en banc*); *Bung's Bar & Grille, Inc. v. Township Council*, 206 N.J. Super. 432, 502 A.2d 1198 (Law Div. 1985).

State courts which have entertained §1983 tax actions without discussing jurisdiction include *Town of Eclectic v. Mays*, 547 So. 2d 96 (Ala. 1989); *Arkansas Writers' Project, Inc. v. Ragland*, 293 Ark. 395, 738 S.W.2d 402 (1987); *Satellink of Chicago, Inc. v. City of Chicago*, 168 Ill. App. 3d 689, 523 N.E.2d 13 (1988); *Uretsky v. Baschen*, 47 Ill. App. 3d 169, 361 N.E.2d 875 (1977); *Dutoit v. Board of County Comm'rs*, 233 Kan. 995, 667 P.2d 879 (1983); *Porter v. Treasurer & Collector of Taxes*, 385 Mass. 335, 431 N.E.2d 934 (1982); *Department of Treasury v. Campbell*, 161 Mich. App. 526, 411 N.W.2d 722 (1987); 423 *South Salina St. v. City of Syracuse*, 68 N.Y.2d 474, 503 N.E.2d 63, 510 N.Y.S.2d 507 (1986), *cert. denied*, 481 U.S. 1008 (1987); *Holden Arboretum v. City of Kirtland*, 19 Ohio App. 3d 125, 483 N.E.2d 167 (1984); *Brower v. Wells*, 103 Wash. 2d 96, 690 P.2d 1144 (1984) (*en banc*).

[16] Most commentators favor mandatory state court jurisdiction for constitutional tax claims. *See, e.g.*, Taylor, "Section

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B. The Vermont Supreme Court's Refusal to Recognize a Federal Cause of Action Here Raises Substantial Issues Of Constitutional and Federal Law.

The Vermont supreme court held that no §1983 tax refund action is available because Respondent Conway is not a "person" within the meaning of the statute. The court relied on *Will v. Michigan Department of State Police*, 109 S.Ct. 2304 (1989), for its conclusion, but neither the holding nor the reasoning there go so far. In *Will*, this Court held that a state employee, acting in his official capacity, could not be sued for *damages* under §1983 in connection with a claim of illegal employment practices. *Id.* at 2307-08. It reasoned that Congress had not intended to disturb traditional notions of state sovereign immunity at the time it enacted §1983. *Id.* at 2309. Crucially, however, such notions never extended to actions for equitable relief – including actions for tax refunds. That point is made clear by the cases relied on in footnote 10 of the *Will* Opinion, many of which required state officials to return unconstitutional taxes and other property obtained in tax seizures. *See* 109 S.Ct. 2311-12, n.10. It is further explained in Justice Stevens's dissent. 109 S.Ct. at 2323.[17] In sum, the Vermont supreme court's decision does not observe established principles of state sovereign immunity in 1871; it expands them. That result is directly

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1983 in State Court: A Remedy for Unconstitutional State Taxation," 95 Yale L. J. 414 (1985); Note, "Clarifying Comity: State Court Jurisdiction and Section 1983 State Tax Challenges," 103 Harv. L. Rev. 1888 (1990).

[17] Other members of this Court also have recognized the "broad and well-established power of courts to provide equitable relief for constitutional wrongs," as opposed to the narrower and more recent recognition of damage actions under the Constitution. *See Carlson v. Green*, 446 U.S. 14, 42-43 (1980) (Rehnquist, J., 17 dissenting).

contrary to the "unique federal remedy" §1983 provides. *Mitchum v. Foster*, 407 U.S. 225, 239 (1972).

Nor did the Vermont supreme court recognize petitioners' §1983 claim for declaratory relief. Noting the regulation issued by respondents after this Court's remand (App., 17a), it concluded that petitioners lacked standing to seek such relief, since a tax refund was not judicially available and since they were not likely again to be denied a tax credit as non-residents. (App., 22a). This ruling runs counter to several decisions of this Court. Most recently, in *Texas Monthly, Inc. v. Bullock*, 109 S.Ct. 890, 896 (1989), the Court emphasized that subsequent changes in tax laws or the unavailability of a refund do not render constitutional tax challenges moot. As it pointed out in *Massachusetts v. Oakes*, 105 L.Ed.2d 493, 503-04 (1989), any other rule would eliminate the incentive of state legislatures to enact constitutional statues, since court challenges could be avoided without cost simply by amending the law if and when suit was brought. *See also Quern v. Mandley*, 436 U.S. 725, 733 n.7 (1978) (class-action suit challenging state's administration of federal emergency assistance program not mooted by state's withdrawal from program). The Court's ruling in *Texas Monthly* echoes what it said in *Montana National Bank*: "[A taxpayer] cannot be deprived of its legal right to recover the amount of the tax unlawfully exacted of it by [a] later decision which, while repudiating the construction under which the unlawful exaction was made, leaves the monies thus exacted in the public treasury." 276 U.S. at 504-05.

Finally, the Vermont supreme court refused to assume jurisdiction directly under the Fourteenth Amendment. In so doing, it rejected a long line of decisions of this Court suggesting that such actions are available. *See Jackson County v. United States*, 308 U.S. 343, 350-51 (1939); *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239, 246-47 (1931); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 679 (1930); *District of Columbia v. Thompson*, 281 U.S. 25, 31-33 (1930); *Carpenter v.*

Shaw, 280 U.S. 363 (1930); *Montana National Bank v. Yellowstone County*, 276 U.S. 499, 504-05 (1928); *Ward v. Love County*, 253 U.S. 17 (1920); *Gaar, Scott & Co. v. Shannon*, 223 U.S. 468 (1912); and *Atchison, Topeka & Santa Fe Railway v. O'Connor* (1912). Although this Court has emphasized that a judicial remedy is the rule when constitutional rights are violated, *Carlson v. Green*, 446 U.S. 14, 26 (1980) (Powell, J. concurring), and despite the fact that it recognized the continuing vitality of the *Iowa-Des Moines National Bank* line of cases last year in *McKesson*, 110 L.Ed.2d at 33-35, and two years ago in *Davis v. Michigan Department of Treasury*, 109 S.Ct. 1500, 1508-09 (1989), the Vermont supreme court concluded that the cases were irrelevant in the face of modern §1983 law and that the Fourteenth Amendment could not overcome state sovereign immunity. (App., 8a-9a, n.7).[18]

C. Conclusion

In sum, the Vermont supreme court's decision not to recognize petitioners' tax challenge under either the Fourteenth Amendment or §1983 points up a deep and unresolved split among the state courts and raises important questions of constitutional and federal law. The lower court has disregarded precedents of this Court holding that refund actions are available under the Fourteenth Amendment; it has ignored others in denying a right to declaratory relief; and it has extended *Will* beyond its holding in rejecting a tax refund action. This Court should accept review to insure that constitutional tax claims are treated the same way, regardless of which state court they happen to be filed in, and to make sure they are treated correctly.

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[18] Three Justices in a previous case have expressed their view that this issue is worthy of review. *See Private Truck Council of America, Inc. v. Quinn*, 476 U.S. 1129 (1986) (White, Brennan, and O'Connor, JJ., dissenting from denial of petition for writ of certiorari).

III. THE ADMINISTRATIVE REMEDY ENDORSED BY THE VERMONT SUPREME COURT FAILS TO SATISFY MINIMUM DUE PROCESS REQUIREMENTS.

Even if state courts were not required to hear constitutional tax challenges under §1983 or the Fourteenth Amendment, state law remedies still must satisfy basic due process requirements. This Court made that point unequivocally last term in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco,* 110 L.Ed.2d 17, 35-36 (1990), but did not have occasion there to consider what such requirements were. In view of the wide disparity in treatment discussed in part II of this petition, this Court should grant review to establish what procedural guarantees are essential in state tax challenges. Whatever the minimum may be, the administrative remedy required by the Vermont supreme court falls short of the mark.

This Court has long insisted that state tax remedies comport with the Due Process Clause, *Central of Georgia Railway Co. v. Wright,* 207 U.S. 134 (1907), and it recently has reiterated the point. *McKesson,* 110 L.Ed.2d at 35-36. Under the due process test developed in *Mathews v. Eldridge,* 424 U.S. 319 (1976) and subsequent cases, the right to a meaningful hearing is a minimum requirement where an individual is deprived of life, liberty or property. This Court also has mandated judicial review where agency factfinding methods are inadequate. *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 415 (1971) (under Administrative Procedure Act).

The allegation here is not merely deprivation of property, moreover, but the deprivation of constitutional rights. Petitioners contend that they were forced to pay additional taxes because of their non-resident or new resident status, in violation of the Fourteenth Amendment.[19] Where such "constitutional facts" are at issue, the

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[19] Accordingly this case must be contrasted with such due process decisions as *Parratt v. Taylor,* 451 U.S. 527 (1981), which

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Due Process Clause has been held to require not merely an administrative hearing but a *judicial* determination of facts and law. *See Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920) (eminent domain); *see also St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 51-52 (1936). This principle, too, has lately been reaffirmed. *See Connick v. Myers*, 461 U.S. 138, 148-150 & n.10 (1983) (collecting cases). *See also* Note, "De Novo Judicial Review of Administrative Agency Factual Determinations Implicating Constitutional Rights," 88 Columbia L. Rev. 1483 (1988); Strong, "The Persistent Doctrine of Constitutional Fact," 46 N.C.L. Rev. 223 (1968). As this Court has emphasized: "Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions." *Califano v. Sanders*, 430 U.S. 99, 109 (1977). *See also Burnett v. Grattan*, 462 U.S. 42, 50 (1984) ("the dominant characteristic of civil rights actions: they belong in court.").

The administrative remedy to which petitioners have been relegated by the Vermont supreme court cannot be squared with basic due process demands. That remedy is a refund request under Vt. Stat. Ann. tit. 32, §8914.[20] *See* App., 12a-15a. Under the state motor vehicle statutes, the decision of whether to conduct a hearing on a §8914 request is left to the Commissioner, as is the question of what discovery shall be permitted and what procedures observed. (App., 62a). Motor vehicle department proceedings are specifically exempted from coverage by the

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involve the deprivation of property only. *Parratt* would be analogous if the warden there had confiscated the prisoner's property because he exercised First Amendment rights, because the prisoner was black, or for some other reason forbidden by the Constitution.

[20] Section 8914 provides: "Any overpayment of such tax as determined by the commissioner shall be refunded." (App., 64a).

Vermont administrative procedure act, which otherwise establishes procedural guarantees in agency cases. *See* Vt. Stat. Ann. tit. 3, §816(b).[21] No motor vehicle department hearing procedures have been published. *See* 6 Code of Vermont Rules, Motor Vehicle Department pp. 14050001 *et seq.* (Weil 1989).[22] Nor is any statute of limitations set forth. *See* App., 13a n.10.

Besides the lack of procedural safeguards, no established right of judicial review exists from tax refund denials under §8914. The Vermont supreme court has refused to imply a right of judicial review from agency proceedings where, as here, the governing statute does not specifically require a hearing. *Reed v. Department of Public Safety*, 137 Vt. 9, 398 A.2d 301 (1979); *Fitzpatrick v. Vermont State Retirement System*, 136 Vt. 510, 394 A.2d 1138 (1978). While the court has suggested that review may be available in such cases by certiorari, *Campbell v. Manchester Board of School Directors*, 152 Vt. 643, 565 A.2d 1318 (1989) (mem.), such review is left to the discretion of the reviewing court. *Lewis v. Holden*, 118 Vt. 59, 99 A.2d 758 (1953).

The absence of a right to procedural safeguards and judicial review must be seen in the context of this case. Petitioner Williams already filed for a tax refund with Respondent Conway before bringing this action and was denied. (App., 24a-28a). Respondent Conway has candidly told the Vermont supreme court that a second request would be futile. (App., 49a). Meanwhile, he has

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[21] The wide discretion permitted the Commissioner is conspicuous in the context of other Vermont tax statutes. Both the Vermont income tax and the general sales and use tax statutes contain very precise procedures and provisions for judicial review, for example. *Cf.* Vt. Stat. Ann. tit. 32, §§5881-5895 (income tax); §§9811-9818 (general sales and use tax).

[22] Since this Court's remand, Respondent Conway has in fact regularly denied §8914 tax refund requests based on *Williams v. Vermont* without providing a hearing. *See* App., 60a (sample reply to refund request).

continued to deny refund requests without providing administrative hearings in similar cases. (App., 60a). This Court should accept review to establish what minimum due process standards are required in state tax challenges, and to insure that such standards are not violated to deprive taxpayers of substantive constitutional rights.

IV. THIS COURT SHOULD DETERMINE WHETHER THE COMMERCE CLAUSE REQUIRES A COMPENSATING USE TAX CREDIT FOR SALES TAXES PAID TO OTHER STATES.

As this Court noted in its opinion in this case, the question of whether states must grant compensating use tax credits under the Commerce Clause has been reserved since *Henneford v. Silas Mason Co.*, 300 U.S. 577, was decided by Justice Cardozo in 1937. *See* 472 U.S. at 21-22. However, as this Court said, the weight of authority strongly supports such a requirement:

> The District of Columbia and all but three States with sales and use taxes do provide such a credit, although reciprocity may be required. CCH, State Tax Guide 6013 (1984). As noted above, see n.2, *supra*, Vermont provides a credit with regard to its general use tax. Such a requirement has been endorsed by at least one state court, *Montgomery Ward & Co. v. State Board of Equalization*, 272 Cal. App. 2d 728, 78 Cal. Rptr. 373 (1969), cert. denied, 396 U.S. 1040 (1970), was advocated 20 years ago in the much-cited Report of the Willis Subcommittee, H. R. Rep. No. 565, 89th Cong., 1st Sess., 1136, 1177-1178 (1965), is adopted in the Multistate Tax Compact, Art. V, §1, and has significant support in the commentary, *e.g.*, J. Hellerstein & W. Hellerstein, State and Local Taxation 637-638 (1978); Developments in the Law: Federal Limits on State Taxation of Interstate Business, 75 Harv. L. Rev. 953, 999-1000 (1962).

Id. at 22.

Despite this consensus, respondents have continued to charge new residents a four percent tax on automobiles

purchased in other states since this Court's decision, without granting a corresponding tax credit. Shortly after this Court's remand in 1985, respondents widened the practice to include Vermont residents who purchase, pay tax, and register cars in other states, in an effort to meet the Court's equal protection concerns. *See* App., 4a, n.3. A Vermont trial court has since rejected a Commerce Clause challenge to the tax based on the Vermont supreme court's decision in *Leverson*, even though *Leverson* was vacated by this Court. 472 U.S. 1014.[23]

Two cases decided by this Court after *Williams* add additional weight to the argument that a compensating use tax credit is constitutionally required. *See D. H. Holmes Co. v. McNamara*, 486 U.S. 24 (1988); *Tyler Pipe Industries, Inc. v. Department of Revenue*, 483 U.S. 232 (1987). In *D. H. Holmes*, this Court upheld a Louisiana sales and use tax imposed on department store catalogs printed out-of-state but sent to Louisiana customers. It found that the tax satisfied the "fair apportionment" requirement established by *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), precisely because *"it provides a credit against its use tax for sales taxes that have been paid in other States."* 486 U.S. at 28 (emphasis added).

In *Tyler Pipe*, this Court applied the "internal consistency" test to a Washington state sales tax on manufactured goods sold out-of-state which did not apply to goods sold in-state. In order to satisfy that test, a tax scheme must be such that it would not result in multiple tax burdens if applied by every jurisdiction. *See Armco, Inc. v. Hardesty*, 467 U.S.

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[23] In *Leverson*, the Vermont supreme court ruled that the Commerce Clause was not implicated because the taxed vehicle had "come to rest" in Vermont. That reasoning was squarely repudiated in *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 322 (1977), and *D. H. Holmes Co. v. McNamara*, 486 U.S. 24, 27 (1988), neither of which was considered in *Leverson*. The superior court decision is *Bloom v. Conway*, No. 592-86CnC (Super. Ct. Oct. 24 1990).

638, 644-45 (1984); *Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159, 169 (1983). In striking down the Washington tax, the Court offered this explanation of its earlier decision in *Henneford*:

> We upheld the tax [there] because, in the context of the overall tax structure, the burden it placed on goods purchased out-of-state was identical to that placed on an equivalent purchase within the State. *This identical impact was no fortuity; it was guaranteed by the statutory exemption from the use tax for goods on which a sales tax had already been paid, regardless of whether the sales tax had been paid to Washington or to another state.*

483 U.S. 245 (emphasis added).[24]

Because it does not provide a compensating use tax credit, the Vermont motor vehicle tax also fails the "internal consistency" test. It subjects the purchase of a car in one state for use in another to two exactions – a sales tax in the state of purchase and a use tax in the state of use. The purchase of the car in Vermont for local use, however, is subjected to only a sales tax.[25] Two members of this Court have recognized this point. *See Tyler Pipe*, 483 U.S. at 255 (Scalia, J., and Rehnquist, C. J., dissenting). The leading commentator has reached the same conclusion. *See* Hellerstein, "Is 'Internal Consistency' Foolish?:

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[24] In a footnote to the cited passage, the Court referred to *Williams v. Vermont* in pointing out that all but three states (one of which is Vermont) do provide a credit for taxes previously paid in other states.

[25] It is not difficult to see that such a tax regime, if widespread or widely-known, would exert a substantial influence on purchasing decisions. Individuals thinking of changing their state of residence would be well-advised to delay purchasing an automobile until after their move, in order to avoid a double tax bite. Such an incentive cannot be squared with this Court's decisions under the Commerce Clause. *See, e.g., Bacchus Imports v. Dias*, 468 U.S. 263, 272 (1984).

Reflections on an Emerging Commerce Clause Restraint on State Taxation," 87 Mich. L. Rev. 138, 160-61 (1988).[26]

A ruling in favor of petitioners on the Commerce Clause issue would dispose of this case without the need for further factual inquiry. In view of the public significance of the issue, the clear weight of authority, and the time already invested by the courts and parties in this case, this Court should grant review to consider whether such a result is required.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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June 1991

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[26] However, the recent affirmance by an equally divided Court in *Ford Motor Credit Co. v. Department of Revenue*, 59 U.S.L.W. 4450 (May 20, 1991), raises questions as to the reach of the "internal consistency" test. *See also* Nowak & Rotunda, "Sales and Use Tax Credits, Discrimination Against Interstate commerce and the Useless Multiple Tax Concept," 20 U. C. Davis L. Rev. 273 (1987).

NOTICE: This opinion is subject to motions for reargument under V.R.A.P. 40 as well as formal revision before publication in the Vermont Reports. Readers are requested to notify the Reporter of Decisions, Vermont Supreme Court, 111 State Street, Montpelier, Vermont 05602 of any errors in order that corrections may be made before this opinion goes to press.

Nos. 88-309 and 89-042

Norman Williams and
Susan Levine

v.

State of Vermont and
William H. Conway, Jr.,
Vermont Commissioner of
Motor Vehicles

Valerie M. Quinn and
James Woodard

v.

State of Vermont and
William H. Conway, Jr.,
Vermont Commissioner of
Motor Vehicles

Supreme Court
On Appeal from
Washington Superior Court

March Term, 1990

FILED IN CLERK'S
OFFICE

FEB 01 1991

Alden T. Bryan, J.

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PRESENT: Allen, C.J. and Gibson, J., and Wolchik, D.J., Katz, Supr. J., and Fisher, D.J., Specially Assigned

KATZ, Supr. J., Specially Assigned. Plaintiffs filed suit in Washington Superior Court to secure refunds of taxes paid to the Department of Motor Vehicles upon first registering automobiles in Vermont. The superior court dismissed plaintiffs' claims. We affirm.

I. Record

In 1980, Norman Williams purchased and registered a Volkswagen Dasher in Illinois, his state of residency at the time, and paid the five percent Illinois sales tax. In 1981, he moved to Vermont with his car. When he subsequently applied to register the vehicle with the Vermont Department of Motor Vehicles, he was required to pay Vermont's four percent use tax pursuant to 32 V.S.A. § 8903(b). Believing the tax was unconstitutional, as it did not apply to *Vermont* residents who purchased and paid a sales tax on vehicles in reciprocating states (including Illinois), see § 8911(9),[1] Williams brought suit in federal court under 42 U.S.C. § 1983 to enjoin enforcement. That suit was dismissed on the authority of the Tax Injunction Act, 28 U.S.C. § 1341. Williams then paid the tax and initiated an administrative proceeding, pursuant to 32 V.S.A. § 8914, for a refund. The Motor Vehicles Department felt constrained to assume the constitutionality of the tax scheme and denied relief.

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[1] Section 8911(9) provides:

> The tax imposed by this chapter shall not apply to:
>
> . . .
>
> (9) pleasure cars acquired outside the state by a resident of Vermont on which a state sales or use tax has been paid by the person applying for a registration in Vermont, providing that the state or province collecting such tax would grant the same pro-rata credit for Vermont tax paid under similar circumstances. If the tax paid in another state is less than the Vermont tax the tax due shall be the difference;

Williams then filed the present action in superior court, serving the State and Commissioner Conway, pursuant to V.R.C.P. 4(d)(2), by serving the Attorney General. Susan Levine joined the action in an amended complaint. Levine, like Williams, had moved to Vermont from another state, bringing her car with her. She had purchased a Chrysler Horizon in New York and paid the seven percent New York sales tax. When she registered the car in Vermont, she was required to pay the state use tax.

In their complaint, Williams and Levine requested refunds of the respective use taxes as well as a declaratory judgment that the tax scheme violates several provisions of the United States Constitution: article I, section 8, clause 3 (Commerce Clause); article IV, section 2 (Privileges and Immunities); and the Fourteenth Amendment (Equal Protection and Privileges and Immunities Clauses). Although now in state court, the complaint rests on the federal cause of action provided by 42 U.S.C. § 1983.

The State filed a motion to dismiss, asserting the constitutionality of the statute. The motion was granted and Williams and Levine appealed to this Court, which affirmed on the strength of our opinion in *Leverson v. Conway*, 144 Vt. 523, 481 A.2d 1029 (1984). The United States Supreme Court then granted certiorari, reversed our decision, declared the statute invalid under the Equal Protection Clause of the Fourteenth Amendment, as it purported to afford unequal treatment to state residents and nonresidents without sufficient justification, and remanded for further proceedings. *Williams v. Vermont*, 472 U.S. 14 (1985). We, in course, remanded to the superior court. There, the State filed an answer raising, among other defenses, sovereign immunity.

In 1985, while a Vermont resident, James Woodard purchased and registered a vehicle in Florida, paying that state's seven percent sales tax. Upon transferring the

registration to Vermont, he was told he had to pay Vermont's use tax. He brought suit in superior court[2] seeking a refund and a declaration that the Department of Motor Vehicles' practice[3] of not affording a tax credit to Vermont residents in his situation – that is, having registered a vehicle out of state prior to returning to Vermont – is both contrary to the statutory scheme and in violation of several provisions of the Vermont Constitution as well as the Fourteenth Amendment to the United States Constitution.

None of the plaintiffs specify any relief against Conway personally. Nor are any allegations made to suggest any conduct on his part, other than that of the Department generally, of which he was Commissioner.

Although nominally consolidated below, the superior court issued separate decisions dismissing the respective complaints. As to the Williams/Levine request for declaratory relief, the court held that the equal protection issues were moot, in light of the Department of Motor Vehicles' 1986 regulation denying the tax credit of § 8911(9) to Vermonters who purchase and *register* cars out of state. Upholding the regulation as consistent with the meaning and intent of the statute, the court reasoned: "Because

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[2] Valerie Quinn joined Woodard's complaint, but she did not join this appeal.

[3] Subsequently, the Department formalized this practice by adopting a rule. See Agency of Transportation, Department of Motor Vehicles, Rule 86-28-E ("Motor Vehicle Purchase and Use Tax") (July 5, 1986). The rule states that the credit provided in 32 V.S.A. § 8911(9) shall be available to Vermont residents only if the registrant "has not previously registered that vehicle in the state where it was acquired or in any other state." *Id.* at (1)(d). In materials filed with the proposed rule, the Department maintained that the "rule reflects the existing practice of the Department." Cover Sheet for Proposed Rule, Motor Vehicle Purchase and Use Tax (July 2, 1985).

section 8911(9) [as clarified by the regulation] now explicitly provides no special treatment for residents, it is facially constitutional and would survive the equal protection scrutiny used by the *Williams* court. Therefore, the plaintiffs no longer can request declaratory judgment. . . . because the equal protection issues concerning what section 8911(9) means and how the exemption must be applied are now moot." As to their claim for a tax refund, the court held that recovery was barred by sovereign immunity, relying on *American Trucking Ass'ns v. Conway*, 146 Vt. 579, 508 A.2d 408 (1986), *cert. denied*, 483 U.S. 1019-20 (1989). As to the Woodard/Quinn complaint, the superior court reached the merits, upheld the Department's regulation against plaintiffs' several challenges, and granted the State's motion to dismiss.

Appeals were taken from both rulings. We affirm, but for reasons differing in several respects from those espoused by the superior court.

II. Claim for Refund

A. 42 U.S.C. § 1983

Both complaints are explicitly and solely founded on 42 U.S.C. § 1983, the Reconstruction Era civil rights statute which provides a private remedy for those alleging abridgment of federal rights by "persons" acting "under color of" state law. Although § 1983 was clearly intended to provide a federal forum for those seeking vindication of federal rights, there is no bar to the statute's use in state courts. *Maine v. Thiboutot*, 448 U.S. 1, 11 (1980); *Beauregard v. City of St. Albans*, 141 Vt. 624, 626, 450 A.2d 1148, 1149 (1982).

However, § 1983 may not be used to make a claim for relief against a state, as states are not "persons" within the meaning of the statute. *Will v. Michigan Dep't of State Police*, 109 S. Ct. 2304, 2308 (1989). Manifestly and explicitly, the State of Vermont is the defendant in these cases.

The purpose for each of these plaintiffs having commenced suit was and remains the refund of all or part of the Vermont use tax paid on their respective autos. The actions seek retrospective relief that can come only from the State treasury. "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest . . . even though individual officials are nominal defendants." *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464 (1945). Under *Will*, § 1983 is not available for such relief.

At oral argument and in a supplementary brief, Mr. Williams suggested that footnote 10 of *Will*, 109 S. Ct. at 2311, supports his position, and exempts the present cases from the clear and general rule laid down by *Will*. We fail to see how. In pertinent part, footnote 10 states:

> Of course a State official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because "official capacity actions for *prospective relief* are not treated as actions against the State." This distinction is "commonplace in sovereign immunity doctrine," and would not have been foreign to the 19th-century Congress that enacted § 1983.

Id. at 2311 n.10 (citations omitted; emphasis supplied). The actions presently before this Court are not for prospective relief. Rather, these are actions to recover money already spent.[4] As Justice Stevens notes in dissent, the holding of *Will*, and in particular, footnote 10, is that

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[4] In an effort to style the relief requested as prospective, Mr. Williams also urges that he should be permitted to receive a credit against future taxes for any sums held wrongfully. Such a remedy is without support in law. If he were correct, such a "credit" would constitute nothing less than a total end run around the sovereign immunity doctrine. A state's immunity would be so tractable as to be useless.

while a state or its agent sued in an official capacity may be sued under § 1983 for injunctive relief, they may not be so sued for monetary relief. *Id.* at 2323.[5] Absent waiver, the Eleventh Amendment[6] bars a damages action against the state brought in federal court; *Will* makes clear that § 1983 does not provide an avenue for the same relief in state court. "*Will* establishes that the State and arms of the State, which have traditionally enjoyed Eleventh Amendment immunity, are not subject to suit under § 1983 in either federal court or state court." *Howlett v.*

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[5] Footnote 10 of *Will* cites *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824), and *United States v. Lee*, 106 U.S. 196 (1882), among others, as cases presumably on the side of prospective relief; plaintiffs assert that the reference to these cases supports their position. *Osborn* does require certain state officials to return a tax wrongfully levied against the Bank, but the officials were already under an injunction not to take the funds. *Osborn* merely upholds a federal court's power to enforce an injunction ordering state officials not to violate federal law. In the present case, plaintiffs never obtained an injunction before paying the tax. In *Lee*, the Court ordered a return of wrongfully taken real property, and the case, in any event, was a suit against *federal* officers.

[6] The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Although the text does not address suits against a state by its own citizens, the Supreme Court has long held that the Amendment's bar encompasses such suits. *Hans v. Louisiana*, 134 U.S. 1 (1890). By its terms, the Amendment restrains only the federal courts; "[n]o Eleventh Amendment question is present . . . where an action is brought in a state court." *Maine v. Thiboutot*, 448 U.S. 1, 9 n.7 (1980).

Rose, 110 S. Ct. 2430, 2437 (1990); see also *Edelman v. Jordan*, 415 U.S. 651, 663, 678 (1974) (action to recover wrongfully withheld welfare payments from state funds barred as action against state); *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. at 462-63 (action seeking refund of taxes collected by state in violation of federal law barred as action against state); Note, *Clarifying Comity: State Court Jurisdiction and Section 1983 State Tax Challenges*, 103 Harv. L. Rev. 1888, 1896 (1990) (discussing import of *Will* on state tax litigation).

Accordingly, we reject plaintiffs' claims for monetary relief against the State or Commissioner Conway under § 1983.[7] Assuming the complaints also rest on state causes

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[7] Plaintiffs also argue on appeal that their causes of action proceed directly from the Fourteenth Amendment of the United States Constitution. See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 389 (1971) (private damage action against federal officials implied from Fourth Amendment). we do not believe a *Bivens*-type action may be brought directly under the Fourteenth Amendment in light of Congress' express provision in 42 U.S.C. § 1983 for a damage remedy against state officials who have violated federal law. The Court in *Bivens* created a remedy against *federal* officials, who are not subject to liability in § 1983 actions. "Indeed, one of the reasons the Court in *Bivens* held that individuals whose Fourth Amendment rights were violated by federal officials had an implied cause of action for damages directly under the Constitution was that no other remedy was available." *Tarpley v. Greene*, 684 F.2d 1, 10 (D.C. Civ. 1982); see Zagrans, "Under Color of" What Law: A Reconstructed Model of Section 1983 Liability, 71 Va. L. Rev. 499, 591 n.472 (1985); Blackmun, *Section 1983 and Federal Protection of Individual Rights – Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. Rev. 1, 22 (1985) ("in *Bivens*, the court put together a working equivalent of § 1983 for constitutional claims against federal officials"); cf. *Bush v. Lucas*, 462 U.S. 367, 380-90 (1983) (no damages remedy implied directly from Constitution where Congress has provided statutory remedies).

(Continued on following page)

of action (although they are designated solely as § 1983 actions), we next consider the State's defense of sovereign immunity.

(Continued from previous page)

Plaintiff rely on several early cases seeking refunds of state or local taxes claimed to be unconstitutional. *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239 (1931); *Carpenter v. Shaw*, 280 U.S. 363 (1930); *Ward v. Love County*, 253 U.S. 17 (1920); *Gaar, Scott & Co. v. Shannon*, 223 U.S. 468 (1912); *Atchison, Topeka & Santa Fe Ry. v. O'Connor*, 223 U.S. 280 (1912). But none of these cases expressly provide a right of action directly under the Constitution. Indeed, four of them were initiated in state court and presumably were founded on state law causes of action. Only *Atchison* began in federal court, but the opinion does not specify on what basis federal jurisdiction was grounded. In any event, all these cases long predate the development of modern § 1983 law, beginning with *Monroe v. Pape*, 365 U.S. 167 (1961). Finally, none of the cases cited by plaintiffs, except *Atchison*, address the question raised in this case, namely, whether an action seeking a refund of unconstitutionally levied taxes survives a state's assertion of sovereign immunity; and *Atchison* discusses sovereign immunity only obliquely: "If he [the defendant Secretary of State] had no right, as he had not, to collect the money, his doing so in the name of the State cannot protect him". 223 U.S. at 287. *Atchison* previews the Court's recent decision in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, ___ U.S. ___, ___, 58 U.S.L.W. 4665, 4668-69 (June 4, 1990), that due process requires that state provide a meaningful remedy for taxpayers challenging the constitutionality of their tax obligations. *Atchison* does not, however, say that a taxpayer may overcome sovereign immunity in a suit brought directly under the Fourteenth Amendment. Recent Eleventh Amendment decisions demonstrate the Supreme Court's unwillingness to override sovereign immunity absent a clear statement by *Congress* to that effect. See, e.g., *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243 (1985). Federal sovereign immunity was not an issue in *Bivens* and its progeny because those cases involved suits not against the sovereign but against federal officials in their personal capacities. See *Carlson v. Green*, 446 U.S. 14 (1980); *Davis v. Passman*, 442 U.S. 228 (1979).

B. Sovereign Immunity

1. Scope of Remand

After remand from the United States Supreme Court and this Court, the State raised for the first time the defense of sovereign immunity. Initially, plaintiffs object to this defense on the ground that the Supreme Court remanded for the sole purpose of directing a refund. For several reasons, we reject this attempt to limit or avoid issues raised below.

The State first responded to the complaint by filing a motion to dismiss, asserting the constitutionality of its taxation scheme. That motion was granted by the superior court. As a matter of pleading, therefore, the State was not at that time required to file an answer or affirmative defenses – which were due only ten days after the motion was denied. V.R.C.P. 12(a). The United States Supreme Court ultimately denied the State's motion, and, until remand, no obligation to plead an affirmative defense existed. Unless somehow barred by the United States Supreme Court's mandate, the State's answer and affirmative defenses, filed September 12, 1985, were timely.[8] See *Patsy v. Board of Regents of State of Florida*, 457 U.S. 496, 515 n.19 (1982) (sovereign immunity defense may be raised on remand after appeal from lower court's dismissal of action on the pleadings). Therefore, plaintiffs' reliance on cases barring new issues after remand, when those cases had already been tried prior to appeal, is unavailing. The Supreme Court explicitly recognized that a full record had not been developed but that the "action was dismissed for failure to state a claim before an answer was filed." *Williams v. Vermont*, 472 U.S. at 28.

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[8] On September 9, 1985, this Court remanded the matter to Washington Superior Court.

Plaintiffs suggest that their case was remanded from the Supreme Court "with specific instructions." To the contrary,

> in light of the fact that the action was dismissed on the pleadings, and given the possible relevance of state law, we express no opinion as to the appropriate remedy.
>
> We hold only that, when the statute is viewed on its face, appellants have stated a claim of unconstitutional discrimination. The decision below is accordingly reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

472 U.S. at 28 (citation omitted). It is clear that nothing more than the granting of the motion to dismiss was reversed; nothing else was decided. If further support were needed, it is supplied by the recent decision noting that "after invalidating a state tax scheme on Commerce Clause grounds, [the Supreme Court has] left state courts with the initial duty upon remand of crafting appropriate relief in accord with both federal and state law." *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, ___ U.S. ___, ___, 58 U.S.L.W. 4665, 4669 n. 16 (June 4, 1990) (citing *Williams v. Vermont* as an example); accord *American Trucking Ass'ns v. Smith*, ___ U.S. ___, ___, 48 U.S.L.W. 4704, 4707 (June 4, 1990).

The Supreme Court, by its mandate, made no decision regarding affirmative defenses or remedial issues which might arise under state or federal law, or which might affect one or another remedy. The State was not precluded from raising a defense such as sovereign immunity.

2. Due Process Requirement of Remedy for Constitutional Violation

Plaintiffs argue that the Fourteenth Amendment prohibition against deprivation of property without due

process of law[9] requires that they be afforded a remedy to secure return of improperly exacted taxes. They are correct.

> To satisfy the requirements of the Due Process Clause . . . in this refund action the State must provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a "clear and certain remedy" for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one.

McKesson Corp. v. Division of Alcoholic Beverages, ___ U.S. at ___, 58 U.S.L.W. at 4671 (citation and footnote omitted). "[A] ruling that a tax is unconstitutionally discriminatory under the Commerce Clause places substantial obligations on the States to provide relief. . . . " *American Trucking Ass'ns v. Smith*, ___ U.S. at ___, 58 U.S.L.W. at 4708.

Vermont must afford a remedy and a meaningful remedy, but not any particular remedy. "[S]ome form of hearing is required before an individual is finally deprived of a property interest." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), *quoted in McKesson Corp.*, ___ U.S. at ___ n.17, 58 U.S.L.W. at 4670 n.17. But that remedy is not, as a matter of constitutional necessity, a plenary suit in the court of general jurisdiction.

Our Legislature has provided a specific administrative procedure to afford plaintiffs the remedy to which they are constitutionally entitled. 32 V.S.A. § 8914 states:

> Any overpayment of [the motor vehicle purchase and use] tax as determined by the commissioner shall be refunded.

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[9] "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV, § 1.

Plaintiffs concede that § 8914 covers unconstitutional taxes as well as arithmetic errors: "The statute makes no distinction between overpayments due to unconstitutionality or other causes." Brief for Appellants Williams and Levine at 19; Brief for Appellant Woodard at 27. See also *United States v. Dalm*, 110 S. Ct. 1361, 1368-69 n.6 (1990) ("The common sense interpretation is that a tax is overpaid when a taxpayer pays more than is owed, for whatever reason or no reason at all. . . . The word ['overpayment'] encompasses 'erroneously,' 'illegally,' or 'wrongfully' collected taxes. . . . ").

Prior to the United States Supreme Court's decision, the remedy provided by § 8914 was not available to Williams and Levine to the extent they challenged the facial validity of § 8903, because the Commissioner of Motor Vehicles is not authorized to rule upon the constitutionality of the *statutes* he is bound to administer. See *Westover v. Village of Barton Elec. Dep't*, 149 Vt. 356, 357, 543 A.2d 698, 699 (1988). Nevertheless, after the Supreme Court's ruling that the use tax statute is facially unconstitutional, a complaint to the Commissioner under § 8914 would not have been futile.[10] The Commissioner at that point would not have been required to address the constitutionality of the statute, for that question had been decided; he would have been faced instead with three potential questions: Did the Department in fact *administer* the use tax statute in a manner that discriminated against nonresidents? If not, did the Department's enforcement of the tax, eventually pursuant to Rule 86-28-E, comply with the statute? If it did comply with the statute, did the

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[10] Neither § 8914 nor any other provisions of Chapter 219 of Title 32 ("Motor Vehicle Purchase and Use Tax") specify a limitations period for actions before the Commissioner pursuant to § 8914. Cf. 12 V.S.A. § 517 (one-year limitation period on actions in court to recover taxes paid under protest). We do not here decide what, if any, statute of limitations is generally applicable to such actions.

practice violate the Commerce or Privileges and Immunities Clauses?[11] Plaintiff Woodard also challenged the Department's practice on statutory grounds, and raised additional constitutional challenges to the use tax *as administered* in the case of Vermont residents who registered their cars out of state before bringing them to Vermont. The Commissioner had jurisdiction to decide all of these claims. See *Alexander v. Town of Barton*, 152 Vt. 148, 151, 565 A.2d 1294, 1296 (1989) (while administrative agencies cannot rule on the constitutionality of legislation, they can adjudicate constitutional questions in determining validity of statutorily-delegated agency practices); *Christian Brothers Institute of New Jersey v. Northern New Jersey Interscholastic League*, 86 N.J. 409, 416, 432 A.2d 26, 29 (1981) (administrative agency may rule on constitutional issues relevant and necessary for resolution of questions within scope of its jurisdiction); 4 K. Davis, Administrative Law Treaties § 26:15, at 480 (2d ed. 1983) (exhaustion of administrative remedies "may be required when a factual context is needed for deciding the constitutional question or when the objecting party may prevail on nonconstitutional grounds"). The first question posed by Williams and Levine, in particular, was suited to agency determination. See *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975) ("Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review."). All plaintiffs in

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[11] The United States Supreme Court declared the tax scheme facially invalid under the Equal Protection Clause; Williams and Levine continue to argue that the statute, even as interpreted and administered by the Department, violates the Privileges and Immunities and Commerce Clauses.

this case, therefore, had an available remedy in § 8914 but chose not to pursue it.

One further point must be addressed. In *American Trucking Ass'ns v. Conway*, 146 Vt. 579, 508 A.2d 408 (1986), this Court considered a constitutional challenge to statutes imposing certain fees on foreign-registered trucks. While ruling that the statutes at issue violated the Commerce Clause of the United States Constitution, we upheld the superior court's refusal to order a refund of fees collected pursuant to the objectionable statutes. This action for a tax refund is a suit against the state, and therefore, is barred by sovereign immunity unless the state has waived its immunity." *Id.* at 587-88, 508 A.2d at 414. We found that 23 V.S.A. § 3020(b), authorizing the Commissioner to refund a tax or fee that "has been illegally or erroneously collected or computed," did not constitute a waiver of sovereign immunity. The statute, we wrote, "merely provides for a refund mechanism if errors are made in determining what tax is imposed. . . . Here, the Vermont legislature has not inferentially indicated its intent to provide the amounts paid to the state under a statute later declared invalid." *Id.* at 588, 508 A.2d at 414.

We recognize that our construction of 23 V.S.A. § 3020(b) in *American Trucking Ass'ns* is incompatible with the meaning we have ascribed to 32 V.S.A. § 8914 in this opinion. The term "overpayment" in § 8914, if anything, implies a narrower authority to award refunds than the term "illegally or erroneously collected" in § 3020(b); yet, as we have explained, § 8914 does provide a remedy to recover "amounts paid to the state under a statute later declared invalid." The Court's confined reading of § 3020(b) was grounded in an understanding of common-law sovereign immunity that is no longer tenable after the Supreme Court's recent unanimous decisions in *McKesson Corporation* and *Howlett v. Rose*, Thus, in *American Trucking Ass'ns*, we said that "the state cannot be sued

without its consent for injuries resulting from the exercise of functions essentially governmental in character." 146 Vt. at 587, 508 A.2d at 413. But due process may require that states entertain suits against them though they have not consented. That is the holding of *McKesson*: "[I]f a State placed a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." ___ U.S. at ___, 58 U.S.L.W. at 4668-69 (footnotes omitted). *Howlett* specifically holds that the Supremacy Clause does not permit a state law defense of sovereign immunity in a § 1983 action brought in state court where a sovereign immunity defense would not be available had the action been brought in a federal forum. ___ U.S. at ___, 58 U.S.L.W. at 4761. "[A]s to persons that Congress subjected to liability, individual States may not exempt such persons from federal liability by relying on their own common law heritage." *Id.* at ___, 58 U.S.L.W. at 4763. The import of these decisions cannot be avoided. Section III of the Court's opinion in *American Trucking Ass'ns* should be considered overruled.

Common-law sovereign immunity, however, is not vitiated entirely. A state must provide some remedy to permit the recoupment of unconstitutionally exacted taxes, but it may choose, and limit, the remedy, so long as it comports with due process principles. *McKesson* notes that "States may avail themselves of a variety of procedural protections against any disruptive effects of a tax scheme's invalidation, such as providing by statute that refunds will be available to only those taxpayers paying under protest, or enforcing relatively short statutes of limitation applicable to refund actions." ___ U.S. at ___, 58 U.S.L.W. at 4674. The Court added that "[s]uch procedural measures would sufficiently protect States' fiscal

security when weighed against their obligation to provide meaningful relief for their unconstitutional taxation." *Id.* Vermont has consented to suit for the recovery of wrongfully levied purchase and use taxes by providing in 32 V.S.A. § 8914 for administrative complaint to the Commissioner of Motor Vehicles. Because that remedy provides taxpayers with due process – indeed, plaintiffs have not challenged the sufficiency of the remedy – that defense of sovereign immunity in a court of plenary jurisdiction remains intact and available to the State.

The superior court could not award a refund of taxes absent the State's waiver of immunity, and, therefore, properly dismissed plaintiffs' claims for monetary relief.

III. Declaratory Relief

Following the Supreme Court's ruling that the statute contravened the Equal Protection Clause, *Williams v. Vermont*, 472 U.S. at 28, the State argued on remand that the Department had not in fact administered the tax in a discriminatory manner, and, to clarify its position, had promulgated Rule 86-28-E. See note 3, *supra*. The superior court agreed, holding that the new rule eliminated the discriminatory treatment of nonresidents and thereby rendered the request for declaratory judgment moot. On appeal, Williams and Levine contend that the statute, even as interpreted and administered by the Department, continues to violate the Privileges and Immunities and Commerce Clauses. They also argue, in an effort to avoid the conclusion that the new rule has rendered their equal protection challenge moot, that the rule contradicts legislative intent and the plain meaning of 32 V.S.A. § 8911(9).

In his complaint and on appeal, Woodard also requests a declaratory ruling that the Department's enforcement of its tax scheme violates the governing

statute. Woodard further raises state and federal constitutional challenges to the scheme as administered. In Woodard's case, the superior court also dismissed the complaint, but reached the merits of his claims, essentially granting declaratory relief to the State.

All three plaintiffs' requests for declaratory rulings on federal constitutional issues assertedly arise under 42 U.S.C. § 1983. Of course, plaintiffs' claims that are grounded on a violation of a state statute or the Vermont Constitution are not properly brought under 42 U.S.C. § 1983 because that statute remedies the deprivation of rights secured by federal law. See *Maine v. Thiboutot*, 448 U.S. at 4. As to all claims, we find that the superior court did not have jurisdiction to award declaratory relief. The § 1983 claims, however, raise certain additional considerations, as addressed below.

Vermont law affords the superior court general authority to grant declaratory relief. 12 V.S.A. §§ 4711-25. Moreover, the Administrative Procedure Act provides for declaratory judgment actions to challenge the "validity or applicability of a rule . . . if it is alleged that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff." 3 V.S.A. § 807. The declaratory remedy, however, does not enlarge the jurisdiction of the court. *Demag v. American Ins. Co.*, 146 Vt. 608, 610, 508 A.2d 697, 698 (1986). If the Legislature has designated another tribunal to hear certain claims, the declaratory judgments statutes do not *ipso jure* vest jurisdiction over those claims in the superior court. In *Demag*, for example, the plaintiff sought a declaration that she was entitled to receive certain death benefits under the Workers' Compensation Act. We held that the superior court had no jurisdiction over this claim, "because plaintiff failed to avail herself of the administrative remedy provided by the Workers' Compensation Act." *Id.* Similarly, in *Trivento v. Commissioner of Corrections*, 135 Vt. 475, 380 A.2d 69

(1977), we considered whether the superior court had jurisdiction to issue a declaratory ruling on the constitutionality of a state prisoner's confinement. We held that it did not.

> Where the Legislature has provided that certain rights (here the right to have one's sentence modified) are enforceable in specified tribunals (here the superior court in which sentence was imposed), the declaratory judgments vehicle should not be used to frustrate that legislative choice. To do so would be to ignore the message of 12 V.S.A. § 4711 and our prior holdings that the Act has not enlarged the subject matter jurisdiction of the courts.

Id. at 478, 380 A.2d at 71-72; see also *Petition of D.A. Associates*, 150 Vt. 18, 20, 547 A.2d 1325, 1326-27 (1988) ("when an administrative remedy is established by statute or regulation, relief must not only be sought in accordance therewith, but must first by exhausted before recourse to the courts is available"). But see *Neal v. Brockway*, 136 Vt. 119, 121, 385 A.2d 1069, ___ (1978) ("bare existence of another adequate remedy is not a bar to a declaratory judgment proceeding where a controversy exists").

Declaratory relief would not give plaintiffs what they want; it would only advise the ultimate decision-maker on points of law necessary to get a refund. As we have made clear, the superior court does not have jurisdiction over the refund claims in this case absent a waiver of sovereign immunity. To the extent plaintiffs seek declaratory rulings in order to obtain their refunds, the superior court likewise lacks jurisdiction to award the requested declaratory relief. As in *Trivento* and *Demag*, plaintiffs may pursue their claims in another forum; the general statutory authority vested in the superior court to award declaratory judgments does not permit litigants to raise such claims, by their own bootstraps, where jurisdiction is otherwise lacking. The judiciary is not empowered to

render advisory opinions the sole purpose of which is to aid in the resolution to a dispute that properly belongs in another tribunal. See *Lace v. University of Vermont*, 131 Vt. 170, 175, 303 A.2d 475, 478 (1973).

Plaintiffs' requests for declaratory relief could not be decided in the superior court, therefore unless such requests are justiciable on their own account, detached from the refund claims.[12] The availability of declaratory

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[12] Even if the declaratory issues were justiciable, "the courts look with disfavor on piecemeal litigation of the matters in controversy." 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure: Civil § 2759, at 648 (2d ed. 1983) (hereinafter Wright, Miller & Kane). Thus, "federal courts have expressed a strong preference that issues of state taxation be litigated in state courts through a suit for refund rather than in federal courts through a suit for declaratory or injunctive relief." *Alcan Aluminium Ltd. v. Department of Revenue of State of Oregon*, 724 F.2d 1294, 1298 (7th Cir. 1984). The disfavor toward piecemeal litigation, however, is not generally treated as jurisdictional, but rather as a matter of discretion. See 10A Wright, Miller & Kane § 2759; cf. 12 V.S.A. § 4716 ("The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding."). Similarly, "[d]eclaratory relief ordinarily should not be granted if a special statutory proceeding has been provided for the determination of particular questions." 10A Wright, Miller & Kane § 2758, at 642. This rule of abstention may be circumvented in the court's discretion. For example, in *Katzenbach v. McClung*, 379 U.S. 294, 296 (1964), which upheld the constitutionality of federal law prohibiting racial discrimination at restaurants, the Supreme Court reached for the merits although the plaintiffs had not pursued their claims as provided by statute, because interference with government action had already occurred (the district court had enjoined the government from enforcing the Civil Rights Act against the restaurant) and the constitutional issues were already before the

(Continued on following page)

or any other particular relief does not alter the fundamental prerequisite to judicial authority – a justiciable controversy.

> The function of a declaratory judgment is to provide a declaration of rights, status and other legal relations of parties to a justiciable controversy. Without such justiciable controversy being present, the declaratory judgment can provide no more than an advisory opinion, which our State judiciary does not have the constitutional power to render.

Lace v. University of Vermont, 131 Vt. at 175, 303 A.2d at 478 (citations omitted). "It is well settled that an action for declaratory relief must be based on an actual controversy; the claimed result or consequences must be so set forth that the court can see that they are not based upon fear or anticipation but are reasonably to be expected." *Robtoy v. City of St. Albans*, 132 Vt. 503, 504, 321 A.2d 45, 46-47 (1974); accord *Beecham v. Leahy*, 130 Vt. 164, 168, 287 A.2d 836, 838 (1972). The Administrative Procedure Act codifies these limits on the court's power over suits testing the validity of agency rules by requiring "that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff." 3 V.S.A. § 807.

Our law conforms with the longstanding federal rule that the availability of declaratory relief turns on whether "the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."

(Continued from previous page)

Court in the companion case. *Id.* These considerations are not present here, and we do not decide whether the rule applied in *Demag* and *Trivento* would give way were similar considerations present.

Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941). A mere abstract question or hypothetical threat is not a sufficient basis for a declaratory judgment. *Golden v. Zwickler*, 394 U.S. 103, 108 (1969). Extra caution is advised in cases involving political and constitutional questions. "The power of courts, and ultimately of this Court to pass upon the constitutionality of acts of Congress arises only when the interests or litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough." *United Public Workers v. Mitchell*, 330 U.S. 75, 89-90 (1947).

It is apparent in the present case that, once severed from the refund claims, no justiciable controversy exists. Williams has now lived in Vermont close to ten years, and we may take judicial notice that he has been a member of the bar of this Court for that period. Levine has lived in the state even longer. Neither suggests a reasonable fear or anticipation of being subject again to the allegedly unconstitutional use tax – that is, of purchasing and registering a vehicle out of state, while enjoying residency in another state, and subsequently seeking to register the car in Vermont. Similarly, Woodard is not likely again to purchase a car out of state and again fail to secure Vermont registration by mail at the outset, thereby avoiding the potential of double taxation.

The United States Supreme Court's opinion in *Golden v. Zwickler* is particularly instructive. Zwickler had distributed an unsigned political handbill, castigating a certain congressman for his stance on a foreign-aid issue. For that act, he was prosecuted under a New York statute barring anonymous election literature. His conviction was reversed on state law grounds, but the statute remained in force. Zwickler then brought suit for a declaratory judgment on the statute's validity. 394 U.S. at 104-105. Writing for a unanimous court, Justice Brennan noted that the criticized congressman had left that office

for a fourteen-year term as a state supreme court justice, and concluded: "We think that under all the circumstances of the case the fact that it was most unlikely that the Congressman would again be a candidate for Congress precluded a finding that there was 'sufficient immediacy and reality' [to justify issuance of a declaratory judgment]." *Id.* at 109 (quoting *Maryland Casualty*, 312 U.S. at 273).[13]

Declaratory relief is, and can be, sought in this case only to further the true goal of obtaining other relief, namely a refund. Because the superior court has no jurisdiction over the refund claim, it also has no jurisdiction to issue advisory declaratory relief.

The superior court's declaratory judgment ruling is vacated; otherwise, its orders dismissing the two complaints are affirmed.

FOR THE COURT:
/s/ Matthew J. Katz
Superior Judge,
Specially Assigned

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[13] The facts in the present cases and in *Zwickler* must be distinguished from those cases where plaintiffs demonstrate a strong likelihood of a recurrence of the controversy in litigation. For example, in *Washington v. Harper*, ___ U.S. ___, 58 U.S.L.W. 4249 (Feb. 27, 1990), a mentally ill prisoner sought declaratory relief regarding prison procedures for forced medication. The Supreme Court there took particular note that given Harper's medical history, it remained likely that officials would seek to administer antipsychotic medications to him in the future. *Id.* at ___, 58 U.S.L.W. at 4252. The Court accordingly reached the merits.

Norman Williams, Esq.
Gravel, Shea & Wright Ltd.
109 South Winooski Avenue
Burlington, VT

Preliminary Statement:

Petitioner herein, Norman Williams, Esq. requested an Administrative Hearing before the Department of Motor Vehicles in reference to his appeal concerning certain aspects of the "Motor Vehicle Purchase and Use Tax" (law) administered by the Commissioner of Motor Vehicles and found at 32, V.S.A. Chapter 219. Following the scheduling of such hearing, petitioner by letter dated October 8, 1982 waived his rights to personal appearance, choosing instead to file an affidavit and memorandum of law. Pursuant to 23 V.S.A. § 106, which section provides that the Commissioner shall determine the procedure at hearings, such procedure was permitted and the findings to follow are based on the information and arguments provided in the documents alluded to above.

Pursuant to petitioner's affidavit and memorandum of law, he contends that the Purchase and Use tax imposed by 32 V.S.A. § 8903(b) violates his rights under the privileges and immunities clause of Article IV and the 14th Amendment of the United States Constitution, claiming the violation occurs because under 32 V.S.A. § 8911(9), the tax is not imposed on Vermont residents who purchase cars in exactly the same way as did petitioner.

Petitioner further in November of 1981 according to his affidavit, filed an action in the Vermont Federal District Court requesting a declaratory judgment that 32 V.S.A. §§ 8903, 8909 and 8911 are unconstitutional. On June 30, 1982 the above action was dismissed on jurisdictional grounds under the Tax Injunction Act, 28 U.S.C. § 1341.

Following such dismissal, petitioner requested the hearing, appealing for a refund on the grounds the "purchase and use tax" is unconstitutional.

FINDINGS OF FACT

That based on the affidavit submitted by petitioner the following set of facts have been ascertained.

The petitioner is now a resident of Winooski, Vermont, having moved to Vermont on or about February 1, 1981, (his affidavit stated 1980 but based on other information, it appears this date should be 1981) and has lived in Vermont continuously since that date. While a resident of Illinois, he purchased, on December 10, 1980, a 1980 Volkswagen Dasher Diesel for $9,300.00 and at such time paid a 5% Illinois sales tax of $465.00. His Illinois registration expired on September 30, 1981 following which on October 22, 1981 he completed and presented to the Vermont Department of Motor Vehicles a Registration, Tax and Title Application, however, he declined to pay the Purchase and Use Tax at that time on the grounds that said tax was unconstitutional. (Although not specifically explained in the affidavit, the tax due on this transaction resulted from the repeal by the Vermont Legislature of a prior exemption for non-resident pleasure cars brought into the state, such exemption to be examined later in this report.) Such refusal to pay the tax imposed resulted in the department refusing registration pursuant to 32 V.S.A. § 8905(b) which states that payment of such fee is a condition precedent to registration.

Following the dismissal of his action in U.S. District Court, petitioner presented a new application to the Department of Motor Vehicles on August 27, 1982. Pursuant to the provisions of 32 V.S.A. § 8907, which permits the Commissioner to fix the value of a motor vehicle at the average book value if the vehicle was not acquired by purchase in Vermont, a book value of $4,300.00 was

placed on the vehicle for tax purposes and petitioner, in addition to the usual fees, i.e., registration and title, paid tax in the amount of $172.00, said tax paid under protest. Petitioner then appeals for a refund on this basis, that the tax is discriminatory and therefore unconstitutional.

It appears obvious that the appeal described herein is merely a case of going through the motions; petitioner is exhausting his administrative remedies prior to moving this matter to a court with proper jurisdiction. His memorandum of law which attacks the purchase and use tax law and/or sections of that law on constitutional questions obviously cannot be decided by an administrative hearing.

Although an administrative hearing can and has overruled department actions in certain cases, it cannot exceed the authority of the Commissioner and in this case that is what the appeal is asking.

Petitioner here relies on his interpretation of §§ 8903(b) and 8911(9):

> § 8903.
>
> (b) There is hereby imposed upon the use within this state a tax of four percent of the taxable cost of a motor vehicle, or $600.00 for each motor vehicle, whichever is smaller, by a person at the time of first registering or transferring a registration to such motor vehicle payable as hereinafter provided, except no use tax shall be payable hereunder if the tax imposed by subsection (a) above has been paid.
>
> § 8911.
>
> (9) pleasure cars acquired outside the state by a resident of Vermont on which sales or use tax has been paid by the person applying for a registration in Vermont, providing that the state or province collecting such tax would grant the same pro-rata credit for Vermont tax paid under similar circumstances. If the tax paid in another

> state is less than the Vermont tax the tax due shall be the difference;

and argues the fact that § 8911(9) allows a Vermont resident to purchase a *pleasure car* in another jurisdiction and receive credit for tax paid if that jurisdiction allows credit for Vermont tax paid under similar circumstances, whereas he paid tax in a state that does allow credit for Vermont taxes, he is not eligible because he was not a Vermont resident at the time of purchase, thus creating a discrimination between residents and nonresidents.

However, the issue here arises because of action by the Vermont Legislature in repealing 32 V.S.A. § 8911(b) effective September 1, 1980. Prior to its repeal that section provided an exemption for:

> "*pleasure cars*, the owners of which were not residents of this state at the time of purchase and had registered and used the vehicle for at least 30 days in a state or province other than Vermont." (emphasis added).

DECISION

Once repealed, the Commissioner's authority to grant the above exemption ceased and pleasure cars even though purchased, registered and used as above are, on and after September 1, 1980, required to pay the tax. Where the Commissioner's actions are directed by statute with no exercise of discretion permitted, he must collect, and once collected he cannot refund and as above, this hearing must refuse a refund in this case as it is contrary to a legislative enactment.

If the legislature has proceeded contrary to constitutional guidelines it must be so informed by a court of competent jurisdiction and not an Administrative Hearing.

In the event of a review by the courts said review in the opinion of the hearing should not be limited to the

narrow issue as proposed by petitioner, but should include a review of the full statutory construction which would cause the courts to find that the tax imposed upon the purchase of a vehicle in Vermont is imposed only on Vermont residents, [32 V.S.A. § 8903(a)], i.e., a non-resident purchasing any type of vehicle in Vermont would not be liable for tax unless he also registers in Vermomt [sic] [32 V.S.A. § 8903(c)]. Under 32 V.S.A. § 8903(b) and § 8911(9), upon which he relies to show discrimination, it would be noted that Vermont residents purchasing any type of vehicle other than a pleasure car, i.e., trucks, tractors, trailers and motorcycles in another jurisdiction are subject to the full use tax, upon registering in Vermont, without benefit of any pro-rata agreement.

/s/ Clyde C. Cassidy
Hearing Officer

ENTRY ORDER

SUPREME COURT DOCKET NO. 83-139

June TERM, 1985

Norman Williams, Esq. and Susan Levine	)	APPEALED FROM:
V.	)	Washington Superior Court
State of Vermont, William H. Conway, Jr., Commissioner of Motor Vehicles	)	DOCKET NO. S-436-82Wnc

In the above entitled cause the Clerk will enter:

Counsel shall show cause by August 21, 1985, why this matter should not be remanded to the trial court for further proceedings in consonance with the decision of the Supreme Court of the United States.

/s/ Frederic W. Allen
Frederic W. Allen
Chief Justice

/s/ William C. Hill
William C. Hill

/s/ Louis P. Peck
Louis P. Peck

/s/ Ernest W. Gibson III
Ernest W. Gibson III

/s/ Thomas L. Hayes
Thomas L. Hayes
Associate Justices

ENTRY ORDER

SUPREME COURT DOCKET NO. 83-139

June TERM, 1985

Norman Williams, Esq. and Susan Levine	)	APPEALED FROM:
V.	)	Washington Superior Court
State of Vermont, William H. Conway, Jr., Commissioner of Motor Vehicles	)	DOCKET NO. S-436-82Wnc

In the above entitled cause the Clerk will enter:

Upon consideration of the memoranda of counsel, together with the opinion of the United States Supreme Court, it is hereby ordered that this matter is remanded to the Washington Superior Court for further proceedings not inconsistent with the opinion of the United States Supreme Court.

BY THE COURT:

/s/ Frederic W. Allen
Frederic W. Allen
Chief Justice

/s/ William C. Hill
William C. Hill

/s/ Louis P. Peck
Louis P. Peck

/s/ Ernest W. Gibson III
Ernest W. Gibson III

/s/ Thomas L. Hayes
Thomas L. Hayes
Associate Justices

STATE OF VERMONT

WASHINGTON COUNTY, SS.

NORMAN WILLIAMS and SUSAN LEVINE

VS.

STATE OF VERMONT and WILLIAM H. CONWAY, JR., COMMISSIONER OF MOTOR VEHICLES

WASHINGTON SUPERIOR COURT

DOCKET NO. S436-82 WNC

FILED MAY 6 '87

MEMORANDUM OF DECISION

This suit was instituted November 24, 1982. The complaint alleges a number of constitutional defects in the state's failure to afford plaintiffs credit for sales tax paid on the purchase of vehicles outside the state and subsequently registered in Vermont. Prior to filing a responsive pleading, the defendants moved for and were granted a dismissal for failing to state justiciable claim. Plaintiffs appealed to the Vermont Supreme Court, *Williams v. Vermont*, No. 83-139, June 15, 1984, and from there to the United States Supreme Court, *Williams v. Vermont*, 472 U.S. ___, June 4, 1985. The high court reversed the dismissal and remanded the case to the Vermont Supreme Court who, in turn, remanded the action to this court.

Defendants answered the complaint and moved for dismissal once again under V.R.C.P. 12(b)(6), but this time asserting the defense of sovereign immunity. Oral arguments were heard on all pending motions March 5, 1987. The parties supplemented their presentation with written briefs.

As mentioned above, plaintiff's complaint was previously tested under rule 12(b)(6). Defendant's answer raises sovereign immunity as an affirmative defense. The relief defendants request would more appropriately attend a Rule 12(c) motion for judgment on the pleadings.

However, the only motion before the court requests a ruling under V.R.C.P. 12(b)(6) with an additional plea that the motion be converted to summary judgment.

The purpose of a Rule 12(b)(6) motion is to test the law of a claim, not the facts which support it. *Levinsky v. Diamond*, 140 Vt. 595, 600 (1982). Summary judgment is only proper when no material facts are in dispute. The decision to convert a motion from Rule 12(b)(6) to summary judgment lies wholly within the discretion of the trial judge. Factors that weigh in the court's consideration are: 1) whether the extra pleading material is comprehensive and likely to support a summary judgment determination, 2) whether the evidence is scanty, incomplete or inconclusive and 3) whether the parties have conducted discovery. 5 Wright & Miller, Federal Practice and Procedure section 1366 (1969).

Applying thee [sic] factors to this case, the court concludes that the Rule 12(b)(6) motion should not be converted to summary judgment. Therefore, the court will once again test the claim to determine whether dismissal is required.

A motion to dismiss challenges the sufficiency of the complaint and admits all factual allegations well plead by the non moving party. *Bennett Estate v. Travelers Insurance Co.*, 138 Vt. 189 (1980). All reasonable inferences are assumed to be true and all contravening assertions are assumed to be false. *Reynolds v. Sullivan*, 136 Vt. 1 (1978). Affirmative defenses which require special pleading cannot be properly considered on a motion to dismiss pursuant to V.R.C.P. 12(b)(6). *White Current Corp. v. State*, 140 Vt. 290 (1981).

Immunity is the controlling question raised by defendants' present motion to dismiss. The court will assume for purposes of this motion that William Conway is being sued in his personal and official capacities. In a personal capacity suit, the plaintiff must show that the official caused the deprivation cited in the complaint. *Monroe v.*

Pape, 365 U.S. 167 (1961). Whereas, in an official capacity action the plaintiff must show that the governmental entity itself was the "moving force" behind the deprivation. *Polk v. Dodson*, 454 U.S. 312, 326 (1981). The defenses available to an official in a personal capacity action are those which may be asserted as personal immunity defenses. *Kentucky v. Graham* ___ U.S. ___, 105 S. Ct. 3099, 3106 (1985). Personal immunity defenses are unavailable in an official capacity action. The only immunities that may be raised in an official capacity action are various forms of sovereign immunity.

The plaintiffs in this case seek monetary and declaratory relief. The law is well settled; state sovereign immunity is no bar to a section 1983 action seeking injunctive or declaratory relief. *Ex Parte Young*, 209 U.S. 123 (1908) *Quern v. Jordan*, 440 U.S. section 32 (1979). In certain cases monetary relief, ancillary to injunctive relief may be awarded regardless of the doctrine of sovereign immunity. *Edelman v. Jordan*, 415 U.S. 651, 667 (1974). However, the defendants are correct in pointing out that when a state preserves its traditional immunities, it cannot be held liable for claims for money damages. *Quern v. Jordan, supra*. Nevertheless, some form of relief is available to plaintiffs.

In a section 1983 civil rights claim only two allegations are required in order to state a cause of action. First, the plaintiffs must allege that some person has deprived them of a federal right. Second, they must allege that the person who deprived them of that right acted under color of state law. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980).

The complaint in this case is sufficient. Defendant's motion must be denied.

ORDER

Defendants' motion to dismiss is DENIED.

DATED: May 6, 1987 /s/ Alden T. Bryan
ALDEN T. BRYAN,
SUPERIOR COURT
JUDGE

STATE OF VERMONT
WASHINGTON COUNTY, SS

NORMAN WILLIAMS and
SUSAN LEVINE

VS.

STATE OF VERMONT and
WILLIAM H. CONWAY, JR.,
VERMONT COMMISSIONER OF
MOTOR VEHICLES

WASHINGTON
SUPERIOR
COURT

DOCKET NO.
S-436-82 WnC

FILED MAY 3 '88

OPINION AND ORDER

This case is currently before the court on the defendants' motion asking the court to clarify or reconsider its May 5, 1987, order denying the defendants' motion to dismiss this action for failure to state a claim. The defendants assert that three issues have been left either completely or partially unanswered by the court's order: (1) whether the defendant William Conway, is being sued in his personal as well as his official capacity; (2) whether sovereign immunity bars the plaintiffs from receiving any or all of the relief requested in their complaint; and (3) whether events occurring after this case returned from the United States Supreme Court have rendered the action partially or completely moot or have deprived the plaintiffs of standing as to any part of all of this action.

The court's May 6, 1987, order dealt only with the first and second issues. This opinion will begin by addressing the third issue and then will clarify and amend the court's position on the first and second issues.

This case began in November 1982. The plaintiffs brought an action under 42 U.S.C. sections 1983 and 1988 challenging the constitutionality of Vermont's motor vehicle purchase and use tax, 32 V.S.A. sections 8903 and 8911. Under the taxing scheme embodied in these statutes, the plaintiffs, who had moved to Vermont from

other states, were forced when registering their motor vehicles to pay a purchase and use tax on the fair market value of those vehicles, which had been purchased, taxed, and registered in their prior states of residence. Under the same taxing scheme, Vermont residents acquiring motor vehicles in another state and paying sales or use tax in the other state receive a credit toward the Vermont tax as long as the other state provides reciprocal privileges to those who pay Vermont tax. In their complaint, the plaintiffs contend that Vermont's motor vehicle purchase and use tax treats residents differently than nonresidents – specifically that only residents can qualify for credits for sales or use tax paid out of state – and that such disparate treatment offends various provision of the state and federal constitutions, including the equal protection, privileges and immunities, and commerce clauses.

In December 1982, shortly after the inception of this action, the defendants filed a motion to dismiss for failure to state a claim. In response to that motion, this court (Morse, J.) issued an opinion holding the purchase and use tax constitutional and dismissing the plaintiffs' complaint. OPINION AND ORDER (February 24, 1983). The plaintiffs appealed that decision to the Vermont Supreme Court.

The Vermont Supreme Court affirmed this court's decision by reference to another decision it issued the same day. *Williams v. State*, 144 Vt. 649, 650 (1985) (citing *Leverson v. Conway*, 144 Vt. 523 (1984)). In *Leverson*, the Vermont Supreme Court, acknowledging that the purchase and use tax did create classifications that treated some motor vehicle owners differently than others, nonetheless upheld the tax. Under an equal protection analysis, the *Leverson* court found the classification scheme created by the purchase and use tax is rationally related to a legitimate state purpose, namely, that those who use

Vermont's state highways must contribute to their maintenance and improvement. *Id.* at 532-33. The court further found that the privileges and immunities clause, *id.* at 534, and commerce clause, *id.*, at 535-36, do not apply to this taxing scheme.

The plaintiffs then took an appeal to the United States Supreme Court, which reversed the decision and remanded the case to the Vermont Supreme Court. *Williams v. Vermont*, 472 U.S. 14 (1985). The Vermont Supreme Court in turn remanded the case to this court.

Since arriving back in this court, this case has been designated as a complex action. The designated judge has recused, and a new judge has been assigned. The parties have deluged the court with discovery motions; numerous hearings and conferences have occurred. A case that came back from the United States Supreme Court as one thick but manageable file has now quadrupled in size. In the course of accumulating paper and changing judges – as well as two years on appeal and two additional years in this court before the May 6, 1987, order – some continuity and focus has undoubtedly been lost.

The defendants' motion to clarify or reconsider has given this court an opportunity to go back and reexamine where this case stands. Beginning with the defendants' February 17, 1986, motion to dismiss, the parties have filed in excess of twenty legal memoranda on the issues discussed in this court's May 6, 1987, opinion. This court cannot and will not endeavor to address every argument and subargument or to analyze every case put forward by the parties. The court has considered every argument and examined every case so raised, but this opinion will explicitly treat only that material most directly relevant to the disposition of the issues now before the court.

First, what did the United States Supreme Court decide in *Williams* and what remains for this court to do?

In *Williams*, the United States Supreme Court held that "when the [motor vehicle purchase and use tax] statute is viewed *on its face*, [the plaintiffs] have stated a claim of unconstitutional discrimination." *Id.* at 28 (emphasis added). In reaching its decision, the Court emphasized the narrowness of its holding. *Id.* at 27. The Court did not hold the statute unconstitutional. Rather, because the case came before the Court in the form of a dismissal of an unanswered complaint, the only decision it could render was whether, on any facts, a trial court could find merit in the plaintiffs' claim. Without a factual record, the Court was unable to say that, purely on its face, the statute was constitutional – or more precisely, that the statute was not unconstitutional. However, the Court found it "conceivable that, were a full record developed; it would turn out that in practice the statute does not operate in a discriminatory fashion." *Id.* at 28. Further, the Court expressed no opinion as to an appropriate remedy, "given the possible relevance of state law," *id.*, thus anticipating that the state might have a sovereign immunity defense.

The *Williams* Court was particularly concerned with the constitutionality in practice of one of the statutory exemptions from the motor vehicle purchase and use tax. Section 8911(9) of Title 32 provides an exemption from the purchase and use tax for

> pleasure cars acquired outside the state by a resident of Vermont on which a state sales or use tax has been paid by the person applying for a registration in Vermont, providing that the state or province collecting such tax would grant the same pro-rata credit for Vermont tax paid under similar circumstances. If the tax paid in another state is less than the Vermont tax, the tax due shall be the difference.

The Court thought it possible that under this exemption a Vermont resident who purchased a car, paid sales tax on it, and registered it in another state would receive a credit

toward Vermont's use tax whereas a nonresident in the plaintiffs' position would not receive a similar credit.

The defendants asserted in the United States Supreme Court that this interpretation did not in fact reflect how the statute operated. They stated that the exemption applied only to Vermonters who bought cars out of state and registered them in state without first registering them elsewhere. *Id.* at 19. In its decision, the Court explicitly conceded that defendants' interpretation of the statute would negate the plaintiffs' claim. *Id.* ("The State's submission, if it is to be accepted, would negate any claim that appellants were treated differently than Vermont residents in similar circumstances.") The Court further stated that, even under the defendants' interpretation of the section 8911(9) exemption, the statute might theoretically operate in a discriminatory fashion but that the plaintiffs would not be the victims of this discrimination and therefore could not properly raise it. *Id.* at 19 n.4.

The entire equal protection analysis in *Williams* is predicated upon the validity of the Court's conditional interpretation of the section 8911(9) exemption. The *Williams* Court asserted that this interpretation was supported by the Vermont Supreme Court's decision in *Leverson*, not because the *Leverson* Court had announced this interpretation, but because it had failed to negate this interpretation. In effect, the Vermont Supreme Court's failure to erase this one ambiguity left the door open for the plaintiffs to pursue their claim.

The *Williams* dissenters point out that because the majority's concern was that on its face the purchase and use tax exemption, 32 V.S.A. section 8911(9), might permit discrimination in its operation, the exemption could be saved by, in effect, negating the possibility of unconstitutionality. This negation could happen in two ways: either

(1) by presenting evidence at trial that the statute operated contrary to the Court's interpretation, i.e., by showing that the exemption does not in fact operate in a discriminatory manner, or (2) by promulgating an administrative regulation clarifying the scope of the exemption, i.e., by changing the face of the statute to eliminate the possible discriminatory interpretation. *Id.* at 35-36 (Blackmun, J., dissenting). Nothing in the majority opinion contradicts the dissenters' contention that the statute could be so cured.

After the United States Supreme Court handed down the *Williams* decision, the Department of Motor Vehicles ("DMV") adopted an administrative rule explicating the 32 V.S.A. section 8911(9) exemption. Under the new rule, a Vermont resident purchasing a motor vehicle out of state is only entitled to a credit for taxes paid out of state if he or she "has not previously registered the vehicle in the state where it was acquired or in any other state." Agency of Transportation, Department of Motor Vehicles, Motor Vehicle Purchase and Use Tax, Rule 86-28-E, section 1(d) (July 5, 1986). The effect of the adoption of this regulation on the current litigation has never been evaluated by any court. At the time Vermont Supreme Court remanded the case to this court, the regulation had only been formulated but not accepted.

DMV's interpretation of the statute must be given great weight because the "construction of statutes by those charged with their execution [ought to be followed by courts] unless there are compelling indications that the construction is wrong." *Town of Cambridge v. Bassett*, 142 Vt. 171, 177 (1982) (quoting *In re Agency of Administration*, 141 Vt. 68, 74-75 (1982)). As a general rule, as long as an administratively adopted rule does not compromise the intent of the legislation upon which it is based, it must be upheld. *Agency*, 141 Vt. at 74. In the specific case of the motor vehicle purchase and use tax, DMV regulations that are "reasonably designed to carry out the intent of

this chapter, shall have the same force as if enacted [by the legislature]." 32 V.S.A. section 8901.

DMV's construction of section 8911(9) is consistent with the plain meaning of that statute, and it does not compromise the stated intent of the motor vehicle purchase and use tax, which is "to . . . improve and maintain the state and interstate highway systems," 32 V.S.A. section 8901.

Section 8911(9) grants tax credits on cars (1) "acquired outside the state by a resident of Vermont," (2) "on which a state sales or use tax has been paid," if (3) "the state . . . collecting such tax would grant the same pro-rata tax credit for Vermont tax paid under similar circumstances." To "acquire" means simply "to come into possession, control, or power of disposal of something, often by some uncertain or unspecified means." Webster's Third New International Dictionary 18 (unabridged ed. 1981). To acquire a car outside the state does not necessarily imply that one will register it out of state. No other term in this section suggests that the exemption refers to cars acquired and registered, rather than merely acquired, out of state. To the extent that the section leaves the question open and allows for cars registered out of state to be included in the exemption, the DMV regulation closes the loophole and clarifies the scope of the exemption.

Closing this loophole does not undercut the overall purpose of the purchase and use tax. To the contrary, the regulation merely insures that Vermonters who acquire and register cars out of state – who, in effect, benefit from the use of highways in two states – share in the tax burden of two states. This result is completely consistent with the statutory statement of purpose of section 8901.

Under 8911(9) as clarified by the DMV regulation, residents and nonresidents are treated identically. Neither will receive an exemption in the form of tax credit on vehicles registered out of state prior to their registration

in Vermont. Because section 8911(9) now explicitly provides no special treatment for residents, it is facially constitutional and would survive the equal protection scrutiny used by the *Williams* court. Therefore, the plaintiffs no longer can request declaratory judgment or injunctive relief, not because these actions are barred by sovereign immunity, but because the equal protection issues concerning what section 8911(9) means and how the exemption must be applied are now moot. As a result of the DMV regulation, an actual justiciable controversy no longer exists. See *Robtoy v. City of St. Albans*, 132 Vt. 503, 504 (1974).

Changing the statute, while it eliminates actions for declaratory and injunctive relief, does not affect the plaintiffs' claim for monetary damages. If the plaintiffs in fact were taxed in a constitutionally defective and discriminatory manner, the claim for a tax refund would survive.

Insofar as what remains of this suit is a tax refund action against the state and defendant Conway in his official capacity, however, the plaintiffs' recovery is barred by sovereign immunity. This issue was addressed and decided in *American Trucking Association v. Conway*, ("*ATA*"), 146 Vt. 579 (1986). In *ATA*, our state supreme court held that "In Vermont, the state cannot be sued without its consent for injuries resulting from the exercise of functions essentially governmental in character." *Id.* at 587 (citing *Stoneman v. Vergennes Union High School District #5*, 139 Vt. 50, 53 (1980)). The *ATA* court specifically recognized that imposition of a tax was just such an essential government activity – one "which could be performed only by a governmental entity." *Id.* Thus, the plaintiffs would not be barred in an appropriate suit from challenging the constitutionality of a statute, such as the purchase and use statute, but they can be barred as a matter of state sovereign immunity from recovering any money as a result.

Moreover, many courts faced with the issue have held that state sovereign immunity can bar money damages against the state, state agencies, and state officials sued in their official capacity in section 1983 suits. *Kristensen v. Strinden*, 343 N.W.2d 67, 76 (N.D. 1983); *DeBleaker v. Montgomery County*, 438 A.2d 1348, 1356 n.4. (Md. 1982). *Also, see* especially the extensive discussion of this issue in *Kristensen* at 75-78. Given the validity of a sovereign immunity defense in a section 1983 action, plaintiffs' claim for tax refund is barred in the absence of specific legislative waiver of immunity. *ATA* at 587-88. The plaintiffs assert such a waiver can be found in 32 V.S.A. section 8914, which provides "Any overpayment of such tax as determined by the commissioner shall be refunded." The plain, unambiguous meaning of overpayment is "payment in excess of what is due" or "the amount paid in excess." Webster's Third New International Dictionary 1609 (unabridged ed. 1981). Thus, by its explicit terms, section 8914 permits the return of excess money paid in by a taxpayer whose taxes are incorrectly calculated and hence "overpaid." The section does not provide for the return of unconstitutionally paid taxes, which are in some sense wrongfully, but not excessively, charged.

Section 8914 on overpayment, while somewhat terse, is nonetheless very similar to the statutory provision interpreted by the Vermont Supreme Court in *ATA*. In that case, the court declined to find a waiver of sovereign immunity in 23 V.S.A. section 3020(b), which provides that

> If the commissioner determines that a tax . . . has been paid more than once . . . or has been illegally or erroneously collected or computed, the excess amount paid or collected shall be credited to the tax account of the licensee . . . Any balance of the excess amount

> remaining in the licensee's account after crediting the overpayment shall be refunded if requested. . . .

The *ATA* court's rationale for declining to find a waiver of sovereign immunity in 23 V.S.A. section 3020(b) also applies in the case before this court and bears repeating in this opinion.

> Here, the Vermont legislature has not inferentially indicated its intent to provide the amounts paid to the state under a statute later declared invalid. The legislature may be presumed to rely on the receipt of tax revenues received from valid properly administered enactments. The power to levy taxes and appropriate the resulting funds is a fundamental attribute of sovereignty. That power would be sorely compromised if private citizens were able to do what the executive branch may not do – spend state funds without legislative appropriation. *ATA*, 146 Vt. at 588.

Under the *ATA* rationale, the legislature is entitled to depend on funds raised from the taxes it levies. If another branch of government takes more than the legislature has authorized, that money must be returned to the taxpayer as an overpayment. But if the judiciary declares a money-raising statute unconstitutional, the legislature remains entitled to the proceeds collected before its statute is declared unconstitutional. To find otherwise would be to improperly diminish the power of the legislature, which must be able to rely on the funds it raises, and which a court cannot order be returned, absent the legislature's explicit consent. Thus, the plaintiffs are barred by sovereign immunity from receiving a tax refund in this case.

In its May 6, 1987, order, this court made a number of overly general statements about the plaintiffs' ability to obtain relief. The statements seemed contradictory because they were not directed closely enough to the specifics of this case. Following the United States

Supreme Court decision in *Williams*, this court was reluctant to terminate this litigation before a full airing of the facts. Such reluctance led us to read the plaintiffs' complaint too broadly. In effect, this court treated the plaintiffs' complaint as if it stated any and all possible claims against any and all possible defendants. We should have evaluated only those claims that the complaint fairly states.

A closer look at the issues in, and development of, this case has revealed that the plaintiffs cannot succeed on claims for declaratory, injunctive, or monetary relief under an equal protection theory directed against the state or William Conway in his official capacity. In addition, a second look at the plaintiffs' complaint fails to review a claim against William Conway in his individual capacity. Therefore, what, if any, relief could be obtained against him is not and never has been an issue before this court. Finally, equal protection is the only theory that currently remains in this suit. Both this court and the Vermont Supreme Court dismissed all other claims, and nothing in the United States Supreme Court's opinion has resurrected them.

ORDER

Based on the foregoing, the defendants' motion for reconsideration is GRANTED. On reconsideration, the defendants' motion to dismiss is GRANTED; the plaintiffs' complaint is DISMISSED.

Dated at Montpelier, Vermont, May 3, 1988.

/s/ Alden T. Bryan
Alden T. Bryan
Presiding Judge

/s/ Patricia B. Jensen
Patricia B. Jensen
Assistant Judge

/s/ Paul H. Guare
Paul H. Guare
Assistant Judge

ENTRY ORDER

SUPREME COURT DOCKET NOS. 88-309 and 89-042

MARCH TERM, 1990

Norman Williams and Susan Levine	APPEALED FROM: Washington Superior Court
v.	DOCKET NOS. S-436-82Wnc S56-86WnC
State of Vermont and William H. Conway, Jr., Vermont Commissioner of Motor Vehicles	FEB 01 1991
Valerie M. Quinn and James Woodard	
v.	
State of Vermont and William H. Conway, Jr., Vermont Commissioner of Motor Vehicles	

In the above entitled cause the Clerk will enter:

Appellants' motion for reargument is denied. We have deleted certain references in the opinion to exhaustion of remedies; that doctrine plays no role in our decision. We decline to remand the case to an agency from which it never originated. We decline to discuss statute of limitation issues which were never briefed or argued and express no view thereon.

Motion for reargument is denied.

BY THE COURT

ENTRY ORDER

SUPREME COURT DOCKET NOS. 88-309 and 89-042

MARCH TERM, 1990

Norman Williams and Susan Levine	APPEALED FROM: Washington Superior Court
v.	DOCKET NOS. S-436-82WnC S56-86WnC
State of Vermont and William H. Conway, Jr., Vermont Commissioner of Motor Vehicles	NOV 09 1990
Valerie M. Quinn and James Woodard	
v.	
State of Vermont and William H. Conway, Jr., Vermont Commissioner of Motor Vehicles	

In the above entitled cause the Clerk will enter:

The superior court's declaratory judgment ruling is vacated; otherwise, its orders dismissing the two complaints are affirmed.

BY THE COURT

IN THE SUPREME COURT
OF THE
STATE OF VERMONT

NORMAN WILLIAMS and SUSAN LEVINE, Plaintiffs-Appellants	)	Supreme Court Docket No. 88-309
v.	)	
STATE OF VERMONT and WILLIAM H. CONWAY JR., VERMONT COMMISSIONER OF MOTOR VEHICLES, Defendant-Appellee	)	
* * * *		
JAMES WOODARD, Plaintiff-Appellant	)	Supreme Court Docket No. 89-42
v.	)	
STATE OF VERMONT and WILLIAM H. CONWAY, JR., VERMONT COMMISSIONER OF MOTOR VEHICLES, Defendant-Appellee	)	

STATE OF VERMONT'S MEMORANDUM IN REPLY TO EXHAUSTION OF REMEDIES ARGUMENT

The State of Vermont agrees that requiring the exhaustion of administrative remedies in the context of these particular actions would be futile.

* * *

Dated at Washington, D.C., This 11th day of April, 1990

STATE OF VERMONT
Jeffrey L. Amestoy, Attorney General

DEPOSITION OF RODNEY GABREE

* * *

Q. So how long have you lived in Brattleboro?

A. Well, since 1941.

Q. 1941?

A. Yes.

Q. Have you ever had residence outside the State of Vermont since then?

A. No.

* * *

Q. After you retired, did you begin to spend your writers in Florida?

A. Yes.

* * *

Q. When you traveled down to Florida, did you ever happen to buy a car down there?

A. Yes.

* * *

Q. Let me just ask you about this. I have shown you what has been marked Deposition Exhibit 1. Is that a bill of sale from Buddy Foster Chevrolet?

A. It would be from Buddy Foster, yes, if he was the dealership.

Q. Is that where you bought the Ford LTD?

A. Right.

Q. And would that have been on March 12th, 1982, that you bought it?

A. That would be about the time. As near as I can remember, that was about the time.

* * *

Q. Now, I am going to show you what has been marked Deposition Exhibit 2, and ask you to look that over.

A. It seems to be right.

Q. Is this a Florida vehicle registration certificate, Exhibit 2?

A. Right.

Q. On this Ford that you purchased in Florida?

A. On the Ford LTD, right.

Q. And so I assume that you registered the car in Florida?

A. Registered the car. They handled all the papers there.

* * *

Q. So you bought the Ford LTD in March of 1982, and you obtained a Florida title and Florida license plates for the car; is that correct?

MR. ESCHEN: Objection.

A. Right.

* * *

Q. I notice that there is also an entry on this Exhibit number 1, state sales tax, for 111 dollars and some cents?

A. Right.

Q. Do you recall paying the state sales tax to Florida?

A. Yes, I do.

* * *

Q. Let's see, you bought the car in March of 1982?

A. Yes. This is in October, 1982, it says here. I know I come home with those plates and it was sometime in the summer that I decided to re-register it because I figured I lived here more than six months and it would have been better to get the Vermont plates. So it would have been

somewhere along in the middle of the summer, I would say. I don't see any date on that at all.

Q. Right. But your best guess or estimate is that you probably filled this out in the summer of 1982?

A. July, August, somewhere along in there, I would say, yes.

* * *

Q. . . . . The first time that you tried to register the car and paid the tax, did you go to Montpelier to register the car?

A. I think I sent it in the first time.

Q. You sent it in?

A. Right, mailed it in.

Q. Were you told through the mail that you would have to pay the tax?

A. According to the form, it was on the from that you had to pay the tax, so I filled it out according to the form.

Q. And you sent in a check with your application?

A. Yes.

Q. But you didn't think it was right that you would have to?

A. I didn't think it was right, and so I protested it, and they said in order to get it registered I would have to go at that time and I come back home and then I decided to go up again because I had been told that there was no way anyone ever had to pay it twice.

Q. Who told you that?

A. Well, different ones that I talked with, just ordinary people, you know. And so I went back up, and at this time someone was taking – what is his name now? I can't think of his name. The head one. We just spoke his name.

MR. ESCHEN: The commissioner?

A. Right. Someone was taking his place. I didn't get the man's name. He said to come home and write a letter in protest, and if I didn't get any satisfaction then they would set up a meeting of some kind up there. And I come home and it seems as though now it was but a few day I had the check in the mail.

Q. So you came home and wrote such a letter?

A. I didn't get a chance to write the letter. I came home and within a few days, a very few days, it seems, I had the check in the mail, so I didn't get around to write the letter. I didn't have to.

* * *

I have carefully read the foregoing deposition, and the answers made by me are correct and true.

/s/ Rodney L Gabree
Rodney Gabree

* * *

HEARING - WORKSHEET

Petitioner ___ Accident No. ___

Address ___

Date of Hearing ___ Time opened ___

Place of Hearing ___

Hearing: Completed ___ Cont'd to ___ Postponed to ___

Recorder on ___ Oaths ___

Memo to file:

Mr. Hibbard appeared at this office a week prior to hearing date for an informal discussion at which time it was decided he would be allowed to register with credit given for tax paid in New York as they were VT. residents at the time.

mts.

FACTS:

Was petitioner the operator? ___

No insurance confirmed ___

FACTS OF ACCIDENT _____

Time closed ___ _____

Hearing Officer

TA-VH-101
03/79

DEPOSITION OF HAROLD R. CONE

* * *

Q. If someone who lived in Burlington had a job in Burlington, had real estate up there, went down to Florida on vacation, absolutely clear in your mind, you were satisfied there was no question that person was just down there on vacation, and they bought a car down there, and they paid the Florida tax and they came back up to Vermont and they could prove to you, and as I say, you were 100 percent satisfied they were a Vermont resident legitimate, didn't take a job in Florida, just there on vacation, satisfied that they paid the tax on it and came back up and asked for a credit, would you give them the credit?

A. I would say yes.

* * *

I have carefully read the foregoing deposition and the answers made by me are true.

/s/ Harold R. Cone
Harold R. Cone

DEPOSITION OF DEAN MARTIN

* * *

Q. Now, the truth of what was going on was that before June of 1985, the Vermont Department of Motor Vehicles allowed a tax credit against the Vermont purchase and use tax to individuals who purchased, paid tax, and registered pleasure cars in reciprocal states, provided those individuals could prove they were Vermont residents at the time they purchased, paid tax, and registered their cars in reciprocal states, isn't that correct?

MR. ESCHEN: Objection.

A. Basically.

* * *

CERTIFICATE

I, CHRISTINA L. BOERNER, Notary Public and Court Reporter, hereby certify that the foregoing pages, numbered 3 through 62, inclusive, are a true and accurate transcription of my stenographic notes of the deposition of DEAN MARTIN taken before me on the 30th day of July, 1986, at 10:15 a.m., at the Attorney General's Office, Montpelier, Vermont, and transcribed under my direction for use in the trial of WILLIAMS -V- STATE OF VERMONT, now pending in the Washington Superior Court.

/s/ _____
CHRISTINA L. BOERNER

DEPOSITION OF LOUIS THERIAULT

* * *

A Yes, sir.

Q Harold Cone testified here a few moments ago, testified here earlier this morning. As part of his testimony was words to the effect that when someone who was a Vermont resident purchased a vehicle outside of Vermont, and if they registered it outside Vermont because they thought they had to for whatever reasons they were led to believe by the dealer, and if they came back to Vermont and then sought a credit for the tax, if the people in the section were satisfied that they had in fact paid the tax and they were a legitimate Vermont resident, that they would get a credit for the tax. Now is that consistent with how you understood things were done in that section up until the time at least when Mr. Cone left the section or was no longer your supervisor?

MR. ESCHEN: Objection. You can answer when I object.

A Yes, I would say that's basically it.

Q So up at least until the time when Mr. Cone was in charge, if a Vermont resident purchased a car, for example, in Florida while down there on vacation, and they came back up to Vermont and wanted to then register the car in Vermont, and they had registered it in Florida, and as long as you were satisfied that that person had felt that they had to register it in Florida and they were genuinely a Vermont resident, you were satisfied of that, and you were satisfied genuinely they had paid the tax, then you would give them a credit here in Vermont for the tax they had paid in Florida; is that correct?

MR. ESCHEN: Objection.

A Yes, sir.

Q That same thing was true after Wayne Sullivan became the chief of document control and you went to work for him as well; is that right?

A Yes, sir.

Q And that same thing continued on with Harold Deal; is that correct?

A No, sir.

Q When did the change take place?

A The date I'm not exactly sure of. It was approximately April or May of '85.

Q And did this change take place as a result of a regulation or similar type of thing promulgated by the Department?

MR. ESCHEN: Objection.

A It was the result of a policy which stated that we would not – if a person registered a vehicle in another state, regardless of whether they were Vermont residents or not, if they came back to this state, they would have to pay the tax.

Q Before that policy change came into effect, if a Vermont resident came to you having registered the car in another state, and you were again satisfied they were a Vermont resident and that they had paid the tax outside Vermont, they would get a credit here in Vermont; is that correct?

MR. ESCHEN: Objection.

A Yes, sir.

* * *

EXAMINATION BY MR. ESCHEN:

Q When a person came to your office and was applying for a tax credit under the motor vehicle purchase and use tax, and the person indicated that the vehicle had been registered in another state, permanently registered in another state, but the person also indicated or convinced you that he was a resident of Vermont at the time that he had purchased the car in that other state, how would you treat that situation?

A At the present time?

Q At all times. Yes, at the present time.

A At the present time if a person who claimed to be a Vermont resident purchased a vehicle out of state, paid a tax there and registered there and came back here, he would have to pay the tax.

Q Let's look back around 1981, 1982. How would you treat that situation back in that period?

A He would be given a tax credit.

* * *

Q In doing your job as you described it today when you told us what you were doing, would it be fair to say you were doing what you understood was the way the Department wanted you to go about your business?

A Yes, sir.

Q And it would be fair to say, would it not, that although there was no written policy telling you that this was the way things were done and that you understood that to be the Department policy in effect?

A Yes, sir.

Q No one ever told you that what you were doing was wrong and you weren't supposed to do it that way; correct?

A I would say that's correct.

* * *

CERTIFICATE

I, Angela M. Leclerc, Court Reporter and Notary Public, hereby certify that the foregoing pages 4-21 inclusive comprise a full, true and correct transcript taken from my stenographic notes in the deposition taken of LOUIS THERIAULT.

/s/ Angela M. Leclerc
Angela M. Leclerc

(SEAL) STATE OF VERMONT (SEAL)

AGENCY OF TRANSPORTATION

DEPARTMENT OF MOTOR VEHICLES

120 State Street, Montpelier, Vermont 05603-0001

October 9, 1985

Mr. P. Walker Grant, Jr.
RFD 1, Box 108A
Killington, Vt. 05751

Dear Mr. Grant:

This is in response to your letter of October 6, 1985.

The reports of the U. S. Supreme Court's decision which appeared in the media were somewhat misleading.

The Court held that while the statute appeared unconstitutional on its face, there was no evidence on the issue of whether it was discriminatory as applied. For that reason, the case was sent back to the Vermont court for further proceedings.

The case is now pending in the Washington Superior Court.

Since there has not been a final decision in the case, nothing has changed and the tax is still being collected. No refunds are contemplated at this time.

Sincerely yours,

/s/ William H. Conway, Jr.
William H. Conway, Jr.,
Commissioner

WHC/pd

Burlington Free Press
Burlington, Vermont
Tuesday, June 19, 1984

Court Upholds Vehicle Use Tax

The Associated Press

Montpelier – Vermont's motor vehicle use tax has been upheld by the state Supreme Court.

The tax was challenged by Leonard Leverson, who moved to Vermont from Wisconsin in 1982 and was required to pay a tax of $112 to register his car.

Leverson claimed the fee was unconstitutional because he had paid a sales tax to the state of Wisconsin when he bought the car.

Vermont imposes a tax of 4 percent, or $600, whichever is smaller, on the purchaser and use of motor vehicles in the state. A person who moves to Vermont from another state is required to pay the tax when he registers his car in Vermont.

Leverson challenged that system, saying it violated the 14th Amendment because it did not give new residents credit for the sales tax they paid in their former state.

The Vermont Supreme Court ruled, however, that a person's right to register his car does not amount to a constitutional privilege.

Assistant Attorney General Andrew Eschen, assigned to the Vermont Transportation Agency, said roughly $1 million a year in revenue was at stake in the case.

§ 105. Hearing before commissioner

In the administration of the laws relating to motor vehicles and to the operators and the operation thereof, the commissioner may conduct hearings, subpoena witnesses, administer oaths and take testimony. He may also cause depositions to be taken and order the production of books, papers and records relating to the matter under investigation. The fees for travel and attendance of witnesses and fees for officers shall be the same as for witnesses and officers before a district court and shall be paid by the state upon presentation of proper bills of cost to the commissioner of finance and management. The fees of witnesses summoned or used by such petitioner shall be paid by him. The commissioner may appoint a hearing officer to conduct hearings.

* * *

§ 106. Procedure upon hearings

The commissioner shall determine the rules and procedure under which such hearings shall be held. On request of the commissioner, the state's attorney of the county where such hearing is to be held shall attend and represent the state.

T.32 § 8903

* * *

§ 8903. Tax imposed

(a) There is hereby imposed upon the purchase in Vermont of a motor vehicle by a resident a tax at the time of such purchase payable as hereinafter provided. The amount of the tax shall be four percent of the taxable cost of any pleasure car as defined in 23 V.S.A. § 4 or motor home, except for school buses, and including vehicles registered at the same fee as pleasure cars pursuant to 23 V.S.A. § 367 except for farm trucks. For any other motor vehicle including school buses it shall be four percent of the taxable cost of the motor vehicle or $600.00 for each motor vehicle, whichever is smaller, except that pleasure cars which are purchased, leased or otherwise acquired for use in short-term rentals shall be subject to taxation under subsection (d) of this section.

* * *

§ 8905. Collection of tax

(a) Every purchaser of a motor vehicle subject to a tax under subsection (a) of section 8903 of this title shall forward such tax form to the commissioner, together with the amount of tax due at the time of first registering or transferring a registration to such motor vehicle as a condition precedent to registration thereof.

(b) Every person subject to a use tax under subsection (b) of section 8903 of this title shall forward such tax form and the tax due to the commissioner with the registration application or transfer, as the case may be, and fee at the time of first registering or transferring a registration to such motor vehicle as a condition precedent to registration thereof.

* * *

§ 8911. Exceptions

The tax imposed by this chapter shall not apply to:

. . . .

(9) pleasure cars acquired outside the state by a resident of Vermont on which a state sales or use tax has been paid by the person applying for a registration in Vermont, providing that the state or province collecting such tax would grant the same pro-rata credit for Vermont tax paid under similar circumstances. If the tax paid in another state is less than the Vermont tax the tax due shall be the difference;

* * *

§ 8914. Refund

Any overpayment of such tax as determined by the commissioner shall be refunded. – 1959, No. 327 (Adj. Sess.), § 13, eff. March 1, 1960.

(2)

No. 90-1935

Supreme Court, U.S.
FILED
AUG 16 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NORMAN WILLIAMS and SUSAN LEVINE,
Petitioners,

v.

STATE OF VERMONT and WILLIAM H. CONWAY, JR., COMMISSIONER, VERMONT DEPARTMENT OF MOTOR VEHICLES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

COUNTER STATEMENT OF THE CASE

Summary

Petitioners contend that the State of Vermont administers its motor vehicle purchase and use tax in a way that discriminates against new residents. They contend that old residents, but not new residents, who acquire and register a car outside Vermont qualify for a tax credit equal to the out-of-state sales tax. The State disputes this contention. The tax credit is available to both the new and the old resident who merely acquires a car outside Vermont, but is not available to any resident who also registers the car out-of-state. *See e.g.*, App. 25a-28a (deposition excerpts of Clinton Krauss).

In 1985 this Court held that the tax credit statute was discriminatory on its face and remanded the case for proceedings consistent with its opinion. *Williams v. Vermont*, 472 U.S. 14 (1985). The Court said it was "conceivable that, were a full record developed, it would turn out that in practice the statute does not operate in a discriminatory fashion." *Id.* at 28. The Court also noted that the action had been "dismissed for failure to state a claim before an answer was filed," and express[ed] no opinion as to the appropriate remedy." *Id.*

After the Supreme Court announced its decision, Vermont promulgated a regulation to confirm its administrative practice. The regulation expressly provides that the credit is not available to a Vermont resident who has "previously registered that vehicle in the state where it was acquired or in any other state." App. 7a-8a.

Upon remand the State filed an answer, pled sovereign immunity (App. 12a-13a) and ultimately won dismissal of the case a second time. Pet. App. 3a-5a. The Vermont Supreme Court held that the State and an official sued in an official capacity could not be held liable for damages under 42 U.S.C. § 1983. *Id.* 5a-9a. It held that Vermont law established an administrative remedy for petitioner's tax claims, but did not establish a parallel remedy in its courts of plenary jurisdiction. *Id.* 11a-17a. It held that petitioners had failed to state a claim for declaratory relief in the superior court.

Factual Background/Preliminary Proceedings

Petitioner Williams (like Petitioner Levine) paid the Vermont motor vehicle and use tax to the State of Vermont, and not "to Respondent William Conway, the Vermont Commissioner of Motor Vehicles." *Compare* Petition at 4. As the Vermont Supreme Court observed, "Manifestly and explicitly, the State of Vermont is the defendant in these cases." Pet. App. 5a. And, although Mr. Williams may have "applied for" a Vermont regis-

tration in October, 1981, he did not pay the tax or register the vehicle until August, 1982. Petition at 4. This was eighteen months after he became a resident of Vermont, *id.*, and should have registered the vehicle in Vermont. *See* 23 V.S.A. §§ 4(30) and 301. (App. 5a and 6a).

State Court Action

Petitioner Williams commenced the action on November 24, 1982, not in 1981. *See*, for example, Pet. App. 31a. Petitioners' amended complaint, dated January 20, 1983, was "explicitly and solely founded on 42 U.S.C. § 1983." *Id.* at 5a. *See also* App. at 9a-11a (Amended Complaint). It was not an application for review of governmental action pursuant to Rule 75 of the Vermont Rules of Civil Procedure (*see* App. 9a-11a), and the availability of that remedy was not an issue in the case. *Compare* Petition at 5, n.2.

Petitioner Levine

One irony in the case is that petitioner Levine would have avoided paying the Vermont purchase and use tax had she registered her car in November, 1979, when she first moved to Vermont. *See Williams v. Vermont*, *supra*, 472 U.S. at 18 ("Prior to September 1, 1980, the statute also excepted 'pleasure cars, the owners of which were not residents of this State at the time of purchase and had registered and used the vehicle for at least thirty days in a state or province other than Vermont.' "). Instead, Ms. Levine continued to drive on her New York registration and did not register in Vermont until December, 1982, three years after she moved. Petition at 5-6. The money she saved in annual registration fees ($32 per year) was about equal to the use tax she eventually paid.

Superior Court Decision (1983), Vermont Supreme Court Decision (1984), United States Supreme Court Decision (1985), and Vermont Supreme Court Entry Order (1985)

The petition accurately states the chronology of events. The several decisions speak for themselves.

Superior Court After Remand

The superior court permitted extensive discovery and the parties developed a substantial record before the court granted the State's motion to dismiss. [Under the Vermont rules of procedure, as under the federal rules, the defense of failure to state a claim may be raised at any time up to trial. *See* V.R.C.P. 12(h) (App. 2a-3a).] The enormity of the record is reflected in the court's Supplemental List of Documents, the list of one hundred plus documents filed in the trial court after remand from the United States Supreme Court. App. 14a-24a. The extent of the discovery is indicated by the title of one of these documents: item #131 (App. 22a) was "Plaintiffs' Motion to File *Fifth* Set of Interrogatories and Requests to Produce and Plaintiffs' *Fifth* Set of Interrogatories and Requests to Produce" (emphasis added).

The discovery materials show that two Vermont residents managed to obtain tax credits even though they had first registered their cars in other states. Petition at 8. However, the discovery materials also show that these instances were aberrations contrary to State policy. The State policy from 1980 to the present has been to deny the tax credit to registrants who first register their vehicles outside Vermont. *See* App. 25a-35a (deposition excerpts of Clinton Krauss 25a-28a, Thomas McCormick 29a-30a, Harold Cone 31a-32a, Dean Martin 33a, and Louis Theriault 34a-35a).

Vermont Supreme Court After Remand

The Vermont Supreme Court did not dismiss the § 1983 claims because it "assumed Respondent Conway was being sued only in his official capacity . . ." *Compare* Petition

at 10, n.6. The record reflects, App. 1a, and the Court noted that in fact Mr. Williams served process on "the State and Commissioner Conway, pursuant to V.R.C.P. 4(d)(2), by serving the Attorney General." Pet. App. 3a. (Ms. Levin intervened in the case by motion.) Rule 4(d)(2) establishes the means for suing state officials in their official capacity, and is not a means for serving process on an individual. App. 2a.

REASONS FOR DENYING CERTIORARI

Certiorari should be denied because, contrary to petitioners' assertions:

1. The Vermont courts gave full effect to the mandate of this Court in *Williams v. Vermont.*

2. The Vermont Supreme Court correctly applied *Will v. Michigan* and Vermont law, and properly rejected petitioners' claims for damages and declaratory relief.

3. Vermont's administrative remedy for resolving tax disputes satisfies due process.

4. Petitioners' commerce clause claim was not decided by the Vermont Supreme Court and is not ripe for review by this Court.

I. THE VERMONT COURTS GAVE FULL EFFECT TO THE MANDATE OF THIS COURT IN *WILLIAMS v. VERMONT.*

Petitioners contend that the Vermont Supreme Court "has taken unusual liberties on remand." Petition at 18. They claim that it dismissed their case "based on respondents' bare assertion that the tax is not administered as written." *Id.* They claim that it "prevented petitioners from obtaining evidence about the truth or falsity of that representation . . ." *Id.*

The record tells a different story. In 1985 this Court noted that petitioners' complaint had been dismissed "be-

fore an answer was filed", and ordered "further proceedings not inconsistent with this opinion." 472 U.S. at 28. The expectation was that the State would file an answer and defend the action, and that is exactly what happened. On September 12, 1985, three days after the case was remanded to the superior court, the State filed an answer and raised affirmative defenses including the petitioners' tories and requests to produce. *See* App. 14a-24a (Sup-App. 12a-13a. The Vermont courts did not take any "liberties" in allowing the State to plead to the complaint or in ruling on those pleadings.

Petitioners' claim that the Vermont Supreme Court dismissed the action "based on respondents' bare assertion that the tax is not administered as written" is wrong on two counts. First, the Court did not base its opinion on such an assertion. *See* Pet. App. 1a-23a. Second, respondents have consistently interpreted the statute to mean that old and new residents should be treated alike, and have administered it accordingly. *See* Pet. App. 40a-41a (trial court analysis and construction of the statute) and App. 25a-30a (Krauss deposition, McCormick deposition).

Petitioners' assertion that the Vermont courts prevented them from obtaining evidence is also unfounded. Discovery was finally halted by the ruling on the State's Motion to Dismiss, but not until petitioners had taken seventeen depositions and served five sets of interrogatories and requests to produce. *See* App. 14a-24a (Supplemental List of Documents). This level of activity was all the more remarkable because for the most part it was conducted, and sanctioned by the court, after the State had filed its motion to dismiss on legal grounds.

II. THE VERMONT SUPREME COURT CORRECTLY APPLIED *WILL v. MICHIGAN* AND VERMONT LAW AND PROPERLY REJECTED PETITIONERS' CLAIMS FOR DAMAGES AND DECLARATORY RELIEF.

Peitioners sued in state court and named the State of Vermont and William Conway, the Vermont Commissioner of Motor Vehicles, as defendants. They based their action explicitly and solely on § 1983. (App. 9a-11a, and Pet. App. 7a). However, they served process on Commissioner Conway by service on the Attorney General's Office (App. 1a), and therefore sued him, in his official capacity only. Their monetary claims, claims for tax refunds, would have been paid from the State treasury.

The Vermont Supreme Court's decision that petitioners thus failed to state a money damages claim under § 1983 is supported by several decisions of this Court. "(W)hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest . . . even though individual officials are nominal defendants." *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464 (1945). Under *Will v. Michigan Department of State Police*, 109 S. Ct. 2304 (1989), § 1983 is not available for such relief. "*Will* establishes that the State and arms of the State, which have traditionally enjoyed Eleventh Amendment immunity, are not subject to suit under § 1983 in either federal court or state court." *Howlett v. Rose*, 110 S. Ct. 2430, 2437 (1990).

The Vermont Supreme Court's decision on petitioners' claim for declaratory relief was also in accord with prior law. The issue in this regard was whether the superior court had jurisdiction to award declaratory relief. The Vermont Supreme Court held that the superior court did not have such jurisdiction because the Vermont Legislature had designated another tribunal to hear petitioners' tax claims and because the declaratory issues were not "justiciable on their own account, detached from the

refund claims." Pet. App. 17a-21a. This reasoning conforms with the applicable Vermont statutes and case law and does not raise federal issues. *See* 12 V.S.A. §§ 4711-25 (Vermont Declaratory Judgments Act); 3 V.S.A. § 807 (Vermont Administrative Procedures Act provision for declaratory judgment actions); *Demag v. American Ins. Co.*, 146 Vt. 608, 610, 508 A.2d 697, 698 (1986) (superior court lacked jurisdiction because plaintiff did not pursue administrative remedy); *Lace v. University of Vermont*, 131 Vt. 170, 175, 303 A.2d 475, 478 (1973) (without justiciable controversy the declaratory judgment can provide no more than advisory opinion, which Vermont judiciary does not have power to render).

This case is not an occasion for resolving any disagreement among the states on whether state courts must entertain tax challenges under § 1983, as petitioners have suggested. The Vermont Supreme Court did not reject the possibility of a state court action to challenge a tax on constitutional grounds. It recognized that "Although § 1983 was clearly intended to provide a federal forum for those seeking vindication of federal rights, there is no bar to the statute's use in state courts. *Maine v. Thiboutot*, 448 U.S. 1, 11 (1980); *Beauregard v. City of St. Albans*, 141 Vt. 624, 626, 450 A.2d 1148, 1149 (1982)." (Pet. App. 7a-8a). At the same time it also recognized, properly, that the state and a state official sued in his official capacity are not persons subject to suit under § 1983.

III. VERMONT'S ADMINISTRATIVE REMEDY FOR RESOLVING TAX DISPUTES SATISFIES DUE PROCESS.

Petitioners' third claim is that "the administrative remedy endorsed by the Vermont Supreme Court fails to satisfy minimum Federal due process requirements." This claim is without merit.

Petitioners cite *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 110 L. Ed.2d 17 (1990). Prop-

erly cited, *McKesson* stands for the proposition that due process does not require that states provide an opportunity for a hearing prior to the exaction of taxes so long as they provide a post-deprivation procedure in which refunds or other suitable relief are available. *Id.* at 35-37. Vermont provides post-deprivation relief through the administrative process of 32 V.S.A. § 8914 and judicial review. See Pet. App. 11a-15a and App. 7a.

Title 23 V.S.A. §§ 105-107 (App. 5a-6a) gives the Commissioner of Motor Vehicles authority to conduct hearings, subpoena witnesses, and cause other acts normally associated with administrative litigation—including discovery. The Commissioner may also appoint hearing officers to conduct hearings; in fact, this is the Commissioner's customary method for administrative review of appeals from Department actions.

Furthermore, contrary to the Petitioners' assertion, once the administrative appeal process is completed under § 8914 and §§ 105-107, a litigant has the right under Vermont's Administrative Procedure Act (APA), 3 V.S.A. §§ 801 *et seq.*, to appeal a contested case to the Vermont Supreme Court, 3 V.S.A. § 815(a). See App. 4a. In the case of *In Re Kelscot, Ltd.*, 152 Vt. 579, 580-581, 568 A.2d 378, 379-80 (1989), the Vermont Supreme Court held that contested cases before Vermont administrative agencies, specifically the Department of Motor Vehicles, are subject to the appeal provisions of 3 V.S.A. § 815. And, in the event a full record has not developed in the original hearing, § 815(b) provides for augmentation of the record to include material evidence. See App. 4a.

In the instant case, Petitioner Williams made various attempts not to pay the tax required by 32 V.S.A. § 8903. In the end, both he and Petitioner Levine paid the use tax in § 8903(b). Petitioner Levine never petitioned for a refund under § 8914 or requested a hearing. Even if she had, and the request was denied, Petitioner's avail-

able, immediate and adequate administrative remedy was a hearing pursuant to 23 V.S.A. §§ 105-107 and appellate review pursuant to 3 V.S.A. § 815. Petitioner Williams did petition for a refund under § 8914. When the Commissioner upheld the Department's imposition of the tax, thus denying the credit, Petitioner Williams had the right to appeal pursuant to the APA, 3 V.S.A. § 815. He failed to pursue that right.

The ready availability of an adequate administrative review process and the right to appellate court review, including the ability to establish a record at the administrative tribunal level and to supplement that record at the appellate level, belie Petitioners' assertion that Vermont's administrative remedy denies them basic procedural due process.

IV. PETITIONERS' COMMERCE CLAUSE CLAIM WAS NOT DECIDED BY THE VERMONT SUPREME COURT AND IS NOT RIPE FOR REVIEW BY THIS COURT.

The Vermont Supreme Court did not decide and did not have to decide petitioners' commerce clause argument. The narrower question before it was whether Vermont's administrative procedure for resolving tax complaints gave the motor vehicle commissioner the authority to rule on this argument. *See* Pet. App. 12a-14a. The Court held that the commissioner had this authority under Vermont law and that the petitioners had an available remedy in the administrative forum. *Id.*

Petitioners' commerce argument is that a compensatory use tax credit is constitutionally required for sales taxes paid to other states. They rely primarily on two cases: *D.H. Holmes Co. v. McNamara*, 486 U.S. 24 (1988) and *Tyler Pipe Industries, Inc. v. Department of Revenue*, 483 U.S. 232 (1987). Neither case mandates the result petitioners are seeking.

D.H. Holmes sustained a Louisiana use tax on catalogs published out-of-state and mailed to Louisiana residents. The Court decided that "in the present case, it really makes little difference for commerce clause purposes whether appellant's catalogs 'came to rest' . . . in Louisiana . . . or whether they were still considered in the stream of commerce." *Id.* at 31. It made little difference because "interstate commerce may be required to pay its fair share of state taxes", *id.*, and because Louisiana met the apportionment requirement established by *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977).

The *Holmes* decision does not implicate the Vermont motor vehicle purchase and use tax because the Vermont tax is not a tax on commerce. The tax is imposed whether the vehicle is purchased in Vermont or elsewhere, and the amount of the tax is the same wherever the vehicle is purchased. Petitioners' vehicles were not in transit when they were taxed, and their owners had settled in Vermont long before they paid the tax. The *Holmes* case did not modify any of the precedents which hold that a state may impose a non-discriminatory tax in these circumstances. *See, e.g., Brown v. Houston*, 114 U.S. 622, 633 (1885); *Henneford v. Silas Mason Co.*, 300 U.S. 577, 582-83 (1937); *General Trading Company v. State Tax Commission*, 322 U.S. 335, 338 (1944).

Nor is the Vermont tax suspect as a result of the *Tyler Pipe* decision. That case concerned a manufacturing tax that the State of Washington imposed only on products sold to out-of-state customers. The Court held that that tax, which was obviously discriminatory, could not be justified as a legitimate "compensating tax." 483 U.S. at 242. Again, the Vermont tax is not discriminatory; it applies to all Vermont residents and applies without regard to where they purchase their vehicles.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX

RONALD W. WEST, Sheriff

RETURN OF SERVICE

STATE OF VERMONT
WASHINGTON COUNTY, ss.

On the 24th day of Nov., 1982, I made service of the Summons & Complaint upon the defendant William H. Conway, Jr., Vermont Commissioner of Motor Vehicles' by delivering a copy of the above to the Vermont State Attorney General at his office in Montpelier, Vermont.

Service ..... $———

Travel .....———Miles ..... $———

Fees ..... $———

postage .... ———

Total ..... $———

/s/ Ronald West
RONALD W. WEST
Sheriff

Vermont Rules of Civil Procedure

* * * *

RULE 4. PROCESS

* * * *

(d) Summons: Personal Service Within the State. The summons and complaint shall be served together. Personal service within the state shall be made as follows:

(1) Upon an individual by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process, provided that if the agent is one designated by statute to receive service, such further notice as the statute requires shall be given. The court, on motion, upon a showing that service as prescribed above cannot be made with due diligence, may order service to be made by leaving a copy of the summons and of the complaint at the defendant's dwelling house or usual place of abode, or to be made by publication pursuant to subdivision (g) of this rule, if the court deems publication to be more effective.

* * * *

(2) Upon the State of Vermont or any agency or officer thereof, by delivering a copy of the summons and of the complaint to the Attorney General or the Deputy Attorney General.

* * * *

RULE 12. DEFENSES AND OBJECTS—WHEN AND HOW PRESENTED—BY PLEADING OR MOTION—MOTION FOR JUDGMENT ON THE PLEADINGS

* * * *

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency

of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

VERMONT STATUTES
ANNOTATED

* * * *

TITLE THREE

Executive

* * * *

Chapter 25. Administrative Procedure

* * * *

§ 815. Judicial review of contested cases

(a) A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in any contested case may appeal that decision to the supreme court, unless some other court is expressly provided by law. However, a preliminary, procedural, or intermediate agency action or ruling is immediately appealable under those rules if review of the final decision would not provide an adequate remedy, and the filing of the appeal does not itself stay enforcement of the agency decision. The agency may grant, or the reviewing court may order, a stay upon appropriate terms.

(b) If, before the date set for court hearing, application is made to the court for leave to present additional evidence, and it is shown to the saitsfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decisions by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.—

* * * *

TITLE TWENTY-THREE

MOTOR VEHICLES

Chapter 1. General Provisions

* * * *

§ 4. Definitions

* * * *

(30) Resident shall include all legal residents of this state and in addition thereto, any person except a person who is domiciled in another state and who returns to the state on a regular basis of no less than weekly who accepts employment or engages in a trade, profession or occupation in this state for a period of at least six months. Also in addition thereto, any foreign partnership, firm, association or corporation having a place of business in this state shall be deemed to be a resident as to all vehicles owned or leased and which are garaged or maintained in this state;

* * * *

Chapter 3. Motor Vehicle Department

* * * *

§ 105. Hearing before commissioner

In the administration of the laws relating to motor vehicles and to the operators and the operation thereof, the commissioner may conduct hearings, subpoena witnesses, administer oaths and take testimony. He may also cause depositions to be taken and order the production of books, papers and records relating to the matter under investigation. The fees for travel and attendance of witnesses and fees for officers shall be the same as for witnesses and officers before a district court and shall be paid by the state upon presentation of proper bills of cost to the commissioner of finance and management. The fees of witnesses summoned or used by such peti-

tioner shall be paid by him. The commissioner may appoint a hearing officer to conduct hearings.

§ 106. Procedure upon hearings

The commissioner shall determine the rules and procedure under which such hearings shall be held. On request of the commissioner, the state's attorney of the county where such hearing is to be held shall attend and represent the state.

§ 107. Notice of hearings

Notice of a hearing held by the commissioner or the hearing officer under the provisions of sections 105 and 106 of this title, shall state the place, day and hour thereof, and warn the petitioner that he may then appear through himself or counsel. Service of such notice shall be sufficient if sent by registered mail to the address given by the petitioner at least five days before the day set for the hearing, provided a return receipt has been received.

* * * *

Chapter 7. Registration

SUBCHAPTER 1. GENERAL REGISTRATION

ARTICLE 1. GENERAL PROVISIONS

§ 301. Persons required to register

Residents as defined in section 4 of the title, except as provided in section 301a and chapter 35 of this title, shall annually register motor vehicles owned or leased for a period of more than thirty days and operated by them, unless currently registered in Vermont. A person shall not operate a motor vehicle nor draw a trailer or semi-trailer on any highway unless such vehicle is registered as provided in this chapter.

* * * *

TITLE THIRTY-TWO

TAXATION AND FINANCE

* * * *

Chapter 219. Motor Vehicle Purchase and Use Tax

* * * *

§ 8903. Tax imposed

(a) There is hereby imposed upon the purchase in Vermont of a motor vehicle by a resident a tax at the time of such purchase, payable as hereinafter provided. The amount of the tax shall be four percent of the taxable cost of the motor vehicle or $500.00 for each motor vehicle, whichever is smaller.

(b) There is hereby imposed upon the use within this state a tax of four percent of the taxable cost of a motor vehicle, or $500.00 for each motor vericle, whichever is smaller, by a person at the time of first registering or transferring a registration to such motor vehicle payable as hereinafter provided, except no use tax shall be payable hereunder if the tax imposed by subsection (a) above has been paid.

(c) The Vermont registration or transfer of Vermont registration of a motor vehicle shall be conclusive evidence that the purchase and use tax applies except as provided in section 8911 of this title.—

* * * *

§ 8914. Refund

Any overpayment of such tax as determined by the commissioner shall be refunded.

MOTOR VEHICLE PURCHASE AND USE TAX

The purpose of this rule is to interpret, and to assist in the implementation of 32 V.S.A. § 8911(9), and to be

declarative of the practice used by the Department of Motor Vehicles with respect to its administration.

The credit provided in and by 32 V.S.A. § 8911(9) shall be available to the following persons in the circumstances set forth below:

1. A resident of Vermont, as defined in 32 V.S.A. § 8902(2), shall be entitled to receive a pro rata credit for a sales or use tax paid to another state upon the submission to the Department of an application for Vermont registration, and the payment of the registration fees if:

   a. The state in which the vehicle was acquired would grant the same pro rata credit for Vermont tax paid under similar circumstances, and

   b. The tax paid to that state is nonrefundable, and

   c. The vehicle acquired is a pleasure car, and

   d. The person applying for a Vermont registration has not previously registered that vehicle in the state where it was acquired or in any other state.

2. For the purpose of this rule, the applicant shall have the burden of proving to the Department's satisfaction that

   a. The state in which the vehicle was acquired would grant the same pro rata credit for Vermont tax paid under similar circumstances, and

   b. The tax paid is nonrefundable, and

   c. That the person applying for a Vermont registration has not previously registered that vehicle in the state where it was acquired or in any other state.

3. For the purpose of this rule, a vehicle shall not be considered to have been registered if the applicant has been issued an intransit permit.

Effective: 7/5/86

STATE OF VERMONT

WASHINGTON COUNTY, ss.

WASHINGTON SUPERIOR COURT

Docket No. S-436-82 Wnc

NORMAN WILLIAMS and
SUSAN LEVINE,

Plaintiffs,

v.

STATE OF VERMONT and WILLIAM H. CONWAY, JR.,
VERMONT COMMISSIONER OF MOTOR VEHICLES,

Defendants.

AMENDED COMPLAINT

Norman Williams, pro se, and Susan Levine, by her attorneys, Gravel, Shea & Wright, Ltd., complain of the Defendants and allege as follows:

PRELIMINARY STATEMENT

1. This action is brought by the Plaintiffs to prevent deprivation under the color of Vermont law of certain rights, privileges and immunities secured to the Plaintiffs by the Constitutions of the United States and the State of Vermont. The action seeks a judgment ordering that the "purchase and use tax" paid by Plaintiffs under Sections 8903 and 8911 of Title 32, Vermont Statutes Annotated, be refunded and declaring that such sections are unconstitutional, both in general and as applied to Plaintiffs on the particular facts of this case.

2. This action is brought pursuant to 42 U.S.C. §§ 1983 and 1988. The relief sought is mandated by

Austin v. New Hampshire, 420 U.S. 656 (1975), and *Baldwin v. Fish & Game Commission*, 436 U.S. 371 (1978).

PARTIES

3. Plaintiff Norman Williams is a Vermont resident who moved to Vermont from Illinois on February 1, 1981. Plaintiff Williams has worked in Vermont since February 1, 1981, and thus qualifies as a resident for purposes of 32 V.S.A. § 8902(2) and 23 V.S.A. § 4(30).

4. Plaintiff Susan Levine is a Vermont resident who moved to Vermont from New York in November, 1979. Plaintiff has worked in Vermont since November, 1979, and thus qualifies as a resident for purposes of 32 V.S.A. § 8902(2) and 23 V.S.A. § 4(30).

5. Defendant William H. Conway, Jr., is Commissioner of the Department of Motor Vehicles for the State of Vermont. Defendant Conway is authorized under 32 V.S.A. § 8901 to administer the Motor Vehicle Purchase and Use Tax imposed by 32 V.S.A. § 8903 and under 32 V.S.A. § 8909 to suspend the right to operate a motor vehicle in the event such tax is not paid.

FACTUAL ALLEGATIONS

* * * *

RELIEF

WHEREFORE, Plaintiffs pray that judgment be entered:

1. Declaring that 32 V.S.A. §§ 8903(b), 8909, and 8911 are unconstitutional and void insofar as they impose a registration fee and license suspension penalty on Plaintiffs by reason of their non-resident status which would not be imposed on Vermont residents in the same circumstances;

2. Ordering the Defendant Department of Motor Vehicles to refund the purchase and use tax of $172 paid by

Plaintiff Williams and the $110 paid by Plaintiff Levine in this case; and

3. Granting Plaintiffs such other relief as the court may deem just, proper, and equitable, including costs and reasonable attorneys' fees as authorized by 42 U.S.C. § 1988.

Dated: Burlington, Vermont
January 20, 1983

The Plaintiffs

/s/ Norman Williams
NORMAN WILLIAMS, ESQ.
Pro Se and Attorney for
Susan Levine
Gravel, Shea & Wright, Ltd.
P.O. Box 1049
Burlington, VT 05402
(802) 658-0220

STATE OF VERMONT

WASHINGTON COUNTY, ss.

WASHINGTON SUPERIOR COURT

Docket No. S-436-82 Wnc

NORMAN WILLIAMS and SUSAN LEVINE,
Plaintiffs

v.

STATE OF VERMONT and WILLIAM H. CONWAY, JR.,
VERMONT COMMISSIONER OF MOTOR VEHICLES,
Defendants

ANSWER

NOW COME the State of Vermont and William H. Conway, Jr., Commissioner of Motor Vehicles, by and through their attorney, Assistant Attorney General Andrew M. Eschen, and answer the Amended Complaint as follows:

AFFIRMATIVE DEFENSES

1. The complaint fails to state a claim upon which relief can be granted.
2. statute of limitations
3. laches
4. waiver
5. estoppel
6. unclean hands
7. mootness
8. sovereign immunity
9. The Vermont motor vehicles purchase and use tax, 32 V.S.A. § 8902 *et seq.* is not unconstitutional on its face.

In the alternative, if it is unconstitutional on its face, the tax is, and has been, administered in a nondiscriminatory fashion and is, in actuality of operation, constitutional.

WHEREFORE, defendants demand that this action be dismissed, and that they be awarded their costs and reasonable attorney's fees.

DATED AT Montpelier, Vermont, this 12th day of September, 1985.

STATE OF VERMONT

JEFFREY L. AMESTOY
Attorney General

By: /s/ Andrew M. Eschen
ANDREW M. ESCHEN
Assistant Attorney General

STATE OF VERMONT

WASHINGTON COUNTY, ss

WASHINGTON SUPERIOR COURT

Docket No. S-436-82 Wnc

NORMAN WILLIAMS and
SUSAN LAVINE (sic)

vs.

STATE OF VERMONT and
WILLIAM H. CONWAY, JR.

SUPPLEMENTAL LIST OF DOCUMENTS

See Attached Lists of Documents 1 through 15 and 16 through 29

30. Certified copy of Opinion from the Supreme Court of the United States.

31. Copy of letter from Atty. Eschen to Attorney Williams re U.S. Supreme Court's Order to pay $945.80 for costs in this action.

32. Copy of Entry Order from the VT Supreme Court: "Counsel shall show cause by August 2, 1985, why this matter should not be remanded to the trial court for further proceedings in consonance with the decision of the Supreme Court of the United States."

33. Memorandum of Law in Response to Show Cause Order.

34. Memorandum in Reply to Appellees' Memorandum Dated July 29, 1985.

35. Copy of Entry Order from the VT Supreme Court: "Upon consideration of the memorandum of counsel, together with the opinion of the United States Supreme Court, it it hereby ordered that this matter is remanded to the Washington Superior Court for further proceedings not inconsistent with the opinion of the United States Supreme Court."

36. Answer.

37. Defendant's First Set of Interrogatories.

38. Plaintiffs' Answers to Interrogatories.

39. Plaintiffs' Answers to Interrogatories.

40. Certified copies of Entry Orders (2) from the VT Supreme Court (See # 32 and # 35).

41. Plaintiffs' Request for Production of Documents and Interrogatories [First Set].

42. Discovery Certificate re Answers to Plaintiffs' First Set of Requests for Production and Interrogatories.

43. Order.

44. Order--designating cause as a complex action and appointing The Honorable James L. Morse trial judge for the proceedings.

45. Defendants' Requests to Admit.

46. Defendants' Second Set of Interrogatories to Plaintiff Levine.

47. Certificate of Service re Responses to Defendants' Second Set of Interrogatories to Levine and to Defendants' Requests to Admit.

48. Copy of letter from Attorney Eschen to Reporter DeSerres re Deposition of Commissioner Conway.

49. Motion to Dismiss and in the Alternative, Motion for Summary Judgment and Memorandum of Law in Support of Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted,

and in the Alternative, Motion for Summary Judgment.

50. Answer to Requests to Admit.

51. Answers to Plaintiffs' Second Set of Interrogatories and Requests to Produce.

52. Copy of Supplemental Memorandum of Law in Support of Motion to Dismiss (original is located in S-56-86 Wnc, Quinn, et al v. State of VT, et al).

53. Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment.

54. Copies of three (3) Vermont cases submitted by Attorney Williams as additional support for Plaintiffs' Memorandum in Opposition to Summary Judgment (by letter dated 3/26/86).

55. Letter filed by Attorney Eschen in response to Attorney Williams' letter dated 3/26/86).

56. Motion to Quash, Memorandum of Law and Affidavit of William H. Conway, Jr.

57. Notice of Deposition Duces Tecum to Thomas McCormick.

58. Notice of Deposition Duces Tecum to George Paquette.

59. Notice of Deposition Duces Tecum to Mary Smith.

60. Notice of Deposition Duces Tecum to Mary LeBlanc.

61. Notice of Deposition Duces Tecum to Mary Ashcroft.

62. Notice of Deposition Duces Tecum to Gordon Currier.

63. Notice of Deposition Duces Tecum to Dean Martin.

64. Notice of Deposition Duces Tecum to Barbara Rugeau.

65. Notice of Deposition Duces Tecum to Wayne Sullivan.

66. Motion for Protective Order, Objection to Notice of Deposition Duces Tecum, and Motion to Quash Subpoenas, with Memorandum of Law.

67. Request for Supplementation.

68. Supplementation to Defendants' Response to Plaintiffs' First Set of Requests for Production and Interrogatories.

69. Notice of Appearance of Manchester & O'Neill, P.C. for Plaintiffs.

70. Order re Defendants' Motion for Protective Order, Objection to Deposition Duces Tecum, and Motion to Quash Subpoenas.

71. Plaintiffs' Motion to Compel Defendant William H. Conway, Jr. to File Sworn Answers to Plaintiffs' First and Second Set of Requests for Production and Interrogatories.

72. Plaintiffs' Motion to Compel Complete Answers of Plaintiffs' First Set of Requests for Production and Interrogatories.

73. Plaintiffs' Motion to Compel Defendant State of Vermont to Answer Plaintiffs' First Set of Requests for Production and Interrogatories & Memorandum of Points and Authorities.

74. Plaintiffs' Third Interrogatories and Requests to Produce.

75. Memorandum of Law in Opposition to Plaintiffs' Motion to Compel Defendant State of Vermont to Answer Plaintiffs' First Set of Requests for Production and Interrogatories & Memorandum of Points and Authorities.

76. Memorandum of Law in Opposition to Plaintiffs' Motion to Compel Complete Answers to Plaintiffs'

First Set of Requests for Production & Interrogatories.

77. Defendants' Motion to Compel Plaintiff Norman Williams to File Sworn Answers to Defendants' First Set of Interrogatories.

78. Plaintiffs' Answers to Interrogatories.

79. Plaintiffs' Supplemental Memorandum in Support of Their Motion to Compel Complete Answers to Plaintiffs' First Set of Requests for Production and Interrogatories.

80. Plaintiffs' Supplemental Memorandum in Support of Their Motion to Compel Defendant State of Vermont to Answer Plaintiffs' First Interrogatories and Request to Produce.

81. Plaintiffs' Notice of Deposition Pursuant to Rule 30(b)(5), (6) of the Vermont Rules of Civil Procedure.

82. Plaintiffs' Notice of Deposition Duces Tecum.

83. Defendants' Third Set of Interrogatories and Request to Produce.

84. Defendants' Request to Admit (Second Set).

85. Defendants' Request to Admit (Second Set).

86. Order re discovery motions.

87. Plaintiffs' Discovery Certificate re Plaintiff Norman Williams' Response to Defendants' Request to Admit (Second Set) and Plaintiff Susan Levine's Response to Defendants' Request to Admit (Second Set).

88. Reply to Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment.

89. Plaintiffs' Motion to Further Extend Discovery and Memorandum of Points and Authorities.

90. Plaintiffs' Notice of Deposition Duces Tecum of Susan Crampton.

91. Plaintiffs' Notice of Deposition Duces Tecum of William Conway.

92. Plaintiffs' Second Notice of Depositions Duces Tecum.

93. Plaintiffs' Motion to Compel Defendants to Answer Plaintiffs' Third Interrogatories and Requests to Produce.

94. Consolidated Motion for Protective Order and Sanctions and Consolidated Memorandum of Law in Support of Motion for Protective Order, in Opposition to Plaintiffs' Motion to Further Extend Discovery, and in Support of Sanctions.

95. Plaintiffs' Answers to Defendants' Third Set of Interogatories and Requests to Produce.

96. Defendants' Motion to Compel Plaintiffs to Answer Third Set of Interrogatories, and Requests to Produce, with Memorandum of Law.

97. Plaintiffs' Amended Notice of Deposition Duces Tecum of Laura Parker.

98. Plaintiffs' Fourth Set of Interrogatories.

99. Motion to File Interrogatories and to Shorten Time for Response.

100. Plaintiffs' Notice of Deposition of Defendant William H. Conway, Jr.

101. Memorandum of Law in Support of Motion for Protective Order and/or Motion to Quash.

102. Plaintiffs' Notice of Deposition of Susan Crampton.

103. Motion to Compel Deposition Testimony and Plaintiffs' Memorandum of Law in Support of Motion to Compel Deposition Testimony.

104. Motion for Protective Order and/or Motion to Quash (Memo is # 101).

105. Motion to Compel and Memorandum of Law in Support of Motion to Compel.

106. Motion for Protective Order and/or Motion to Quash, with Memorandum of Law.

107. Motion to Shorten Time for Notice of Deposition or to Extend Discovery Schedule and Notice of Deposition Duces Tecum to Clyde Cassidy.

108. Memorandum in Opposition to Plaintiffs' Motion to File Interrogatories and to Shorten Time for Response.

109. Plaintiffs' Memorandum of Law in Opposition to Motions to Quash Depositions of William Conway and Susan Crampton.

110. Plaintiffs' Motion to Recuse the Honorable James L. Morse and Memorandum of Points and Authorities.

111. Motion for Protective Order and/or Motion to Quash, with Memorandum of Law.

112. Reply to Plaintiffs' Motion to Compel Deposition Testimony.

113. Plaintiffs' Motion to Enlarge the Period of Time for the Completion of Discovery and Memorandum of Points and Authorities.

114. Motion to Compel Production of Documents.

115. Response to Defendants' Motion to Compel Dated December 3, 1986.

116. Memorandum of Law in Support of Motion to Compel Production of Governmental Memorandum Dated September 4, 1985, September 12, 1985 and November 27, 1985.

117. Defendants' Memorandum in Opposition to Plaintiffs' Motion to recuse the Honorable James L. Morse, and in Reply to Plaintiffs' Memorandum of Law in Opposition to Motions to Quash Depositions of William Conway and Susan Crampton.

118. Plaintiffs' Memorandum of Law in Response to Defendants' Opposition to Fourth Set of Interrogatories.

119. Plaintiffs' Memorandum of Law in Opposition to Motion to Quash Deposition of Clyde Cassidy.

120. Plaintiffs' Response to Defendants' Rely to Motion to Compel Deposition Testimony.

121. Reply to Plaintiffs' Motion to Compel Production of Documents and Affidavit of John Dooley.

122. Order of Recusal.

123. Motion for Expedited Ruling on Defendants' Motion to Dismiss for Failure to State a Claim Upon Which Relief can be Granted Due to Defendants' Sovereign Immunity and to Preclude Further Discovery and Memorandum of Law in Support of Motion for Expedited Ruling on Defendants' Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted Due to Defendants' Sovereign Immunity, and to Preclude Further Discovery.

124. Letter from Attorney Williams to Attorney Eschen dated 12/22/86, letter from Attorney Eschen to Attorney Williams dated 1/22/87, and Affidavit of Roy Williams filed in connection with Plaintiffs' Motion to File [Fourth Set of] Interrogatories and to Shorten Time for Response, and the Defendants' Memorandum in Opposition thereto.

125. Memorandum of Law in Opposition to Defendants' Motion to Dismiss Dated January 12, 1987.

126. Letter from Administrative Judge for Trial Courts to counsel of record advising he will consider a request to have the matters designated a complex action when the presiding judge in either Washington Superior Court or Chittenden Superior Court makes such a request under V.R.C.P. 16.1.

127. Letter from Reporter Leclerc to Attorney O'Neill re Deposition of Harold R. Cone (copy).

128. Letter from Reporter Leclerc to Attorney O'Neill re Depositions of Louis Theriault and Lois Hebert (copy).

129. Designation of actions as complex under V.R.C.P. § 16.1 and assignment of Judge Alden T. Bryan until further order of the Administrative Judge.

130. Reply to Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss Dated January 12, 1987.

131. Plaintiffs' Motion to File Fifth Set of Interrogatories and Requests to Produce.

132. Reply to Plaintiffs' Motion to File Fifth Set of Interrogatories and Requests to Produce.

133. Plaintiffs' Reply Memorandum in Opposition to Motion to Dismiss.

134. Defendants' Response to Plaintiffs' Reply Memorandum in Opposition to Motion to Dismiss (February 27, 1987).

135. Plaintiffs' Supplemental Memorandum of Law in Opposition to Motion to Dismiss.

136. Copy of Defendants' Supplemental Memorandum of Law (original is in Docket No. S-56-86 Wnc, Quinn v. State of VT).

137. Plaintiffs' Reply to Defendants' Supplemental Memorandum of Law.

138. Copy of Defendants' Response to Plaintiffs' Reply Memorandum (Dated April 6, 1987).

139. Copy of recent Second Circuit Opinion by Judge Oakes in *McClary v. O'Hare*, 786 F.2d 83 (2d Cir-1986) (New York), letter from Attorney O'Neill dated 4/15/87).

140. Letter from Attorney Eschen in response to Attorney O'Neill's letter dated 4/15/87.

141. Defendants' Response to Plaintiffs' Reply Memorandum (Dated April 6, 1987).

142. Memorandum of Decision.

143. Motion for Clarification and/or Reconsideration of May 6, 1987 Order Denying Motion to Dismiss, and in the Alternative, Motion for Interlocutory Appeal, with Memorandum of Law, and Memorandum of Law in Support of Motion for Interlocutory Appeal.

144. Plaintiffs' Memorandum of Law in Opposition to Interlocutory Appeal.

145. Reply to Plaintiffs' Memorandum of Law in Opposition to Interlocutory Appeal.

146. Response to Plaintiffs' Reply Memorandum in Opposition to Motion for Reconsideration or Interlocutory Appeal.

147. Plaintiffs' Reply Memorandum in Opposition to Motion for Reconsideration or Interlocutory Appeal.

148. Plaintiffs' Reply Memorandum in Opposition to Motion to Appeal.

149. Letter from Attorney O'Neill to Judge Bryan re status of case, dated 11/9/87.

150. Letter from Attorney Eschen to Judge Bryan in response to Attorney O'Neill's letter dated 11/9/87.

151. Defendants' Response to Plaintiffs' Reply Memorandum in Opposition to Motion to Appeal.

152. Copy of recent decision by the VT Supreme Court on interlocutory appeals in the case of State *v. McCann*; copy of decision and article appearing at 80 A.L.R. 2d 1035 and 80 A.L.R. 2d 1040, concerning refunds of state taxes paid under protect or under compulsion; and copy of recent decision by Magistrate Niedermeier on the scope of attorney-client privilege and executive privilege in *Melson v. Bristow*, submitted by Attorney Williams.

153. Reply to Norman Williams' Letter of January 5, 1988.

154. Plaintiffs' Motion for Preservation and Immediate Discovery of Defendants' Motor Vehicle Computer Records.

155. Reply to Plaintiffs' Motion for Preservation and Immediate Discovery of Defendants' Motor Vehicle Computer Records.

156. Opinion and Order.

157. NOTICE OF APPEAL dated May 16, 1988 and filed May 17, 1988.

158. Index of Cases and copies of miscellaneous cases.

DATED at Montpelier, County of Washington and State of Vermont this 10th day of June, 1988.

/s/ Barbara B. Perojo
BARBARA B. PEROJO
Deputy Clerk

DEPOSITION OF CLINTON KRAUSS

* * * *

July 9, 1986

* * * *

Could you start off for us, please, by telling us what the position is you presently hold with the Department of Motor Vehicles?

A Presently I'm a Supervisor of the Information Section.

Q And as the Supervisor of the Information Section, what do you do?

A Our section is responsible for asking—answering telephone queries regarding a broad range of registration and licensing subjects, for handling a half dozen different types of paperwork.

* * * *

Q You say along the lines of this right along. You're talking about 23 VSA 301; is that correct?

A Where Vermont residents are required to register in the State of Vermont. And I had been administering it along those lines regularly. This particular gentleman disagreed with me vociferously—that's the politest way of putting it—and was so rude and insistent that I went to the Commissioner—I was so certain of my interpretation of it that I went to the Commissioner and asked him to deal with this gentleman. In the course of so doing, he pointed this out and strengthenend, if you will, my understanding of how I was supposed to be administering to Vermont residents who had or a person who was claiming to be a Vermont resident who had registered the vehicle elsewhere. According to the Commissioner and this section here and my prior understanding, he didn't possess that privilege.

Q Do I correctly understand that the reason he did not possess the privilege of claiming the exemption was because that Vermont resident had actually registered the car out of state?

A Registered and presumably used, yes.

Q Was the key criteria the registration of the car outside Vermont?

A It was certainly key. It was important.

* * * *

Q The particular one I think you're looking for is dated. It's dated May of 1985.

A May of '85. Yes. This is the—this placement [regulation] reflects almost precisely what was explained to me by the Commissioner in the course of handling the gentleman from Case two.

Q . . . Do I understand that up until the time that particular written policy, which you've now referring to, was implemented, that the inspectors were occasionally making what you perceived to be those mistakes in applying the—in giving exemptions to people they shouldn't?

A Yes, occasionally.

Q How often would you say over the period of time, say, since you've been in your position, has that occurred?

A Let's see. Six, seven that I know of.

* * * *

Q . . . . And I believe you were asked a question by Mr. O'Neill with respect to whether those individuals, in your opinion, were—should have been denied the credit.

A He said because they were really out of staters at the time, if I recall.

Q What was your understanding of that question?

A Of that exchange?

Q Yes.

A That these two were really not Vermont residents anyway, and that was the reason why, and the reason why really is because they registered there and used it there rather than the fact that they were or were not residents. The main one was they registered their vehicle there, and a Vermont resident doesn't have that privilege, so it just didn't apply to people who were out of staters; it applied also to any Vermonter, legitimate Vermonter who might have done the same thing. If this man had been my next door neighbor, I would have taxed him. He doesn't possess the privilege of driving to New Jersey

and buying license plates. I would have had to tax him. So whether he was [former Governor] Deane Davis or not, I would have taxed anyone in these circumstances, resident or non-resident.

MR. O'NEILL: Excuse me. Just for the record, if I may, when you say these circumstances, you're pointing to the two instances on the memo which is Exhibit 18; is that right?

DEPONENT: Yeah. And by circumstance I mean person who had registered a vehicle out of state for a—a person, resident or non-resident, who had registered a vehicle out of state for a significant period of time and used it there and then brought it back. So whether that person was a resident or a non-resident, I taxed them. The circumstances were the same.

* * * *

Q For example, George Aiken [former U.S. Senator], and that individual were to purchase a car in another state and first register that vehicle in that other state and were then to return to Vermont, would would be your practice?

A Taxed him. He did not possess that privilege.

* * * *

EXAMINATION BY MR. O'NEILL:

Q You testified . . . that after September 1, 1980 when the non-resident exemption has been repealed but before the conversation you had with Commissioner Conway, you were denying the credit to people who had registered their car outside of the State of Vermont who claimed to be Vermont residents and then sought to register it in Vermont; is that right?

A Yes.

* * * *

Q In the instances where you had some disagreement with the conclusions that had been reached by the inspectors, roughly a half dozen occasions, did you speak

with the inspectors about your disagreement with them, or did you try to get the policy clarified in some way so that there would be uniform policy?

A Both ways. Both ways.

Q What did you do?

A Well, some of these memos are, as I said, attempts to get clarification up from my position on this leg up and then hopefully down, and I have some reason to believe, perhaps, you know, that the substance of that policy may have been in part due to my efforts. I don't know.

Q You say the May of 1985 policy?

A Yes. That certainly reflects my understanding of how it was to be done right along, and I was pleased to see it.

* * * *

Q In other words, residency had nothing to do with that question? It was purely a question of where the vehicle was being registered?

A Yes.

I have carefully read the foregoing deposition and the answers made by me are true.

/s/ Clinton Krauss
CLINTON KRAUSS

STATE OF VERMONT
COUNTY OF WASHINGTON

At Montpelier in said County this 31st day of July, 1986, personally appeared the above-named Clinton Krauss and made oath that the foregoing answers, subscribed by him, are true.

Before me,

/s/ [Illegible]
Notary Public

My commission expires 2/10/87.

DEPOSITION OF THOMAS McCORMICK

* * * *

November 25, 1988

* * * *

Q And Mr. McCormick, could you tell us please how you are employed?

A I am director of law administration for the Department of Motor Vehicles.

Q How long have you held that position?

A Since about the third week in September of 1981.

* * * *

Q Let me rephrase the question to you. Isn't it a perfectly reasonable interpretation of that statute that the statute is intended to permit—irrespective of whether they register the car permanently outside Vermont or not— a person to go ahead and purchase—a Vermont resident to purchase an automobile outside of Vermont and not have to come back to Vermont and pay the tax again?

MR. ESCHEN: Objection.

A No, I don't think so.

* * * *

CERTIFICATE

I, Ann M. Whiting, Court Reporter and Notary Public, do hereby certify that the foregoing pages, numbered 4 through 78, inclusive, are a true and accurate transcription of my stenographic notes of the deposition of THOMAS McCORMICK, taken before me on Tuesday, November 25, 1986, at 10:52 a.m., for use in the matter of NORMAN WILLIAMS and SUSAN LEVINE VS STATE OF VERMONT AND WILLIAM H. CONWAY, JR., COMMISSIONER OF MOTOR VEHICLES. VALERIE M. QUINN, ET AL VS STATE OF VERMONT, ET AL.

/s/ _____

ANN M. WHITING

DEPOSITION OF HAROLD R. CONE

* * * *

November 20, 1986

* * * *

A . . . '75 approximately I moved into Montpelier as what was called a supervising inspector. . . . two, three years later it was changed to chief inspector, the title, not the job but the title. And I was chief inspector until the 1st of September, 1984 when I retired.

* * * *

Q Mr. Cone, to your personal knowledge how many times was a tax credit given to someone who had first registered their car out of state, again, in the example of a Vermonter who had first registered their car out of state?

A By me?

Q Yes.

A I can't even tell you for sure that I gave it in more than one instance. You know, I can't remember back that far.

Q And with respect to the people who were beneath you who were in your division, do you know how many times they granted a credit to a Vermonter who had first registered outside the state?

A No, I have no way of knowing.

* * * *

CERTIFICATE

I, Angela M. LeClerc, Court Reporter and Notary Public, hereby certify that the foregoing pages 4-43 inclusive comprise a full, true and correct transcript taken from my stenographic notes in the deposition taken of HAROLD R. CONE, taken before me as Notary Public on Thursday, November 20, 1986, at the Tavern Motor Inn, Montpelier, Vermont, and transcribed by me for use in the case of *Norman Williams and Susan Levine vs. State of Vermont and William H. Conway, Jr., Commissioner of Motor Vehicles*, Docket No. 436-82 WnC, now pending before the Washington Superior Court.

/s/ Angela M. Leclerc
ANGELA M. LECLERC

My commission expires February 10, 1987.

DEPOSITION OF DEAN MARTIN

* * * *

July 30, 1986

* * * *

Q. Mr. Martin, how are you employed, sir?
A. With the Vermont Department of Motor Vehicles.

* * * *

Q. Do you feel qualified to give an answer on behalf of the entire Department of Motor Vehicles with respect to how the tax credit was administered before or after June of '85?
MR. O'NEILL: Objection.
A. No.

* * * *

I have carefully read the foregoing deposition and the answers made by me are true.

/s/ Dean Martin
DEAN MARTIN

STATE OF VERMONT
COUNTY OF WASHINGTON

At Montpelier in said county this 25th day of August, 1986, personally appeared the above-named DEAN MARTIN, and made oath that the foregoing answers, subscribed by him are true.

Before me,

/s/ Bonnie L. Rutledge
Notary Public

DEPOSITION OF LOUIS THERIAULT

* * * *

November 20, 1986

* * * *

Q And, Mr. Theriault, how are you employed, sir?

A I'm an inspector for the Vermont Department of Motor Vehicles.

* * * *

Q Let me see if I understand what's going on here. In all cases would that person receive the tax credit? Let me rephrase the question. In 1981 or 1982 would a person who holds himself out as a Vermont resident automatically be entitled to a tax credit from you?

MR. O'NEILL: Objection.

A No one—I've never exempted anyone automatically from paying a tax based solely on the claim that he was a Vermont resident.

Q What would you look to in determining whether an individual would be entitled to the tax credit?

A First of all, the type of vehicle concerned, whether or not we had reciprocity with whatever particular state we're talking about. I would try and determine that he in fact was a Vermont resident through the question of unemployment and so on, and if he had proof that he paid the tax, I would say he would be tax exempt.

Q And if the person had permanently registered the vehicle in another state before he came back to Vermont, was that a consideration that you would look into?

A It's a consideration.

* * * *

CERTIFICATE

I, Angela M. Leclerc, Court Reporter and Notary Public, hereby certify that the foregoing pages 4-21 inclusive comprise a full, true and correct transcript taken from my stenographic notes in the deposition taken of LOUIS THERIAULT, taken before me as Notary Public on Thursday, November 20, 1986, at the Tavern Motor Inn, Montpelier, Vermont, and transcribed by me for use in the case of *Norman Williams and Susan Levine vs. State of Vermont and William H. Conway, Jr., Commissioner of Motor Vehicles*, Docket No. 436-82 WnC, now pending before the Washington Superior Court.

/s/ Angela M. Leclerc
ANGELA M. LECLERC

My commission expires February 10, 1987.

Supreme Court, U.S.
FILED
SEP 19 1991
OFFICE OF THE CLERK

(3)

No. 90-1935

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

NORMAN WILLIAMS AND SUSAN LEVINE,
Petitioners,

v.

STATE OF VERMONT AND WILLIAM H. CONWAY, JR., COMMISSIONER, VERMONT DEPARTMENT OF MOTOR VEHICLES,
Respondents.

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Respondents take a double tack in seeking to defeat certiorari. They begin by asserting that the tax at issue has been administered constitutionally, Brief in Opposition at 1, 6, even though this Court has already held that their "say-so" will not suffice. Williams v. Vermont, 472 U.S. 14, 21 (1985).[1] They next engage in a legal discussion which manages to miss every point raised by the certiorari petition. In particular, Respondents: a) ignore the distinction between tax refunds and legal damages; b) assert without authority that a wholly-discretionary administrative "remedy" can satisfy due process, even though the remedy has already been denied to Petitioner and declared futile by Respondents themselves; and c) rely on a discredited

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[1] Respondents also disparage Petitioner Williams for attempting to obtain an injunctive and declaratory relief before paying the tax, Brief in Opposition at 2-3, even though Respondents have argued for the past five years that they are not required to refund unconstitutional taxes under "sovereign immunity." Id. at 2; cf. Vermont supreme court decision at Petition 5a, 15a-17a.

notion of "interstate commerce" to avoid Petitioners' claim that the internal consistency or fair apportionment test should be applied to sales and use taxes.

In short, nothing in Respondents' Brief suggests that certiorari should be denied. The following points deserve particular emphasis:

1. The Vermont supreme court on remand dismissed this action on the pleadings for the second time. It did not do so because of any defect in the complaint. Remarkably, it dismissed the case because this Court said that the complaint stated a cause of action and that a factual determination would be required. That factual determination, the Vermont supreme court said, could only be sought in an independent administrative proceeding. It was not available in state court.

In reaching its conclusion, the state supreme court ruled that no cause of action is available under section 1983 or the federal Constitution for suits which seek tax refunds or other equitable relief. (App. 5a-9a.) It also held that declaratory relief is foreclosed once a tax has been paid, even where it is paid to avoid criminal and civil sanctions. (App. 17a-23a.) The state court thus refused to make the factual determination which this Court deemed essential to save the tax. In the meantime, Respondents continue to collect the tax in the amount of $1 million annually. (App. 61a.)

2. In dismissing, the Vermont supreme court relegated Petitioners to a second administrative request for refund before the commissioner of motor vehicles. (App. 14a-15a; 17a.)[2] Petitioner Williams already made such a request at the outset without success, and

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[2] The Court raised but did not answer the question of whether such a request would be barred by the statute of limitations. (App. 13a n.10.)

Respondents conceded in a brief to the state supreme court that further efforts would be futile. (App. 49a.) Moreover, the state court held that the commissioner had properly denied Petitioner Williams' refund request the first time because he could not consider constitutional claims. (App. 13a.) Nevertheless, the court said Petitioners' only recourse was to ask again. (App. 14a-15a.)

3. Under Vermont law, the commissioner of motor vehicles may deny a refund request without providing any hearing whatsoever. In fact, he has regularly denied motor vehicle purchase and use tax refund requests based on constitutional claims without providing a hearing after this Court's decision in this case. (App. 60a) (citing examples). If the Commissioner does elect to provide a hearing, he has complete discretion as to whether and to what extent to take evidence, allow discovery, or observe procedural

rules. See App. 12a-15a. Respondents do not dispute these points in their Brief in Opposition.

Respondents assert only that a right to judicial review in state court is available from the decision of the commissioner, relying on In Re Kelscot, Ltd., 152 Vt. 579, 568 A.2d 378 (1989). Cf. Brief In Opposition at 9. The case is inapposite. It involved a different tax and a different statute. The crucial distinction is that Kelscot was a "contested case," as to which judicial review is expressly provided by the Vermont Administrative Procedure Act, Vt. Stat. Ann. tit. 3, §815. It was a "contested case" precisely because an administrative hearing was required by statute. As the court explained, "the legal rights of Kelscot were determined by the Department [of Motor Vehicles], as required by law, after a hearing. 23 V.S.A. §3112." 152 Vt. at 581 (emphasis added). In the instant case, by contrast, no hearing is required by statute. The

Commissioner may conduct a hearing or not, as he so chooses. Consequently, the case is not "contested" and no right of appeal lies. See In re Marble Savings Bank, 137 Vt. 123, 400 A.2d 1022 (1979); Reed v. Department of Public Safety, 137 Vt. 9, 398 A.2d 301 (1979); Fitzpatrick v. Vermont State Retirement System, 136 Vt. 510, 394 A.2d 1138 (1978).[3]

4. Contrary to Respondents' assertion, the issue of whether state courts may refuse to hear constitutional tax claims under 42 U.S.C. §1983 is presented by this case, since it provides a possible

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[3] In the instant case, Petitioner Williams took the steps specified by the Vermont Rules of Civil Procedure for perfecting an appeal. He filed an original complaint seeking a tax refund in the state superior court after his refund request was denied by the commissioner. This procedure is set forth in Rule 75, V.R.Civ.P., for appeals from agency rulings where no other appeal procedure is specified by statute. Like the federal rules, the state rules of civil procedure require only a "short and plain statement of the claim." Rule 8, V.R.Civ.P. See also Burroughs v. West Windsor Board of School Directors, 141 Vt. 234, 446 A.2d 377 (1982) (recitation of Rule 75 not required to perfect appeal). The state supreme court nonetheless held, without any explanation, that this case "never originated" from the commissioner. (App. 47a.)

grounds for affirmance. See Revere v. Massachusetts General Hospital, 463 U.S. 239, 244 n.6 (1983); Dandridge v. Williams, 397 U.S. 471, 475-76 n.6 (1970). The Vermont supreme court held, as a matter of federal law, that no cause of action for a tax refund or other equitable relief is available under 42 U.S.C. §1983 or the Fourteenth Amendment. It also held that declaratory relief is foreclosed by state law. As Petitioners have argued, the state court's conclusions with respect to federal law deserve this Court's review. See Petition for Writ of Certiorari at 21-23. As to declaratory relief, the state court and Respondents are surely wrong to suggest that the issue is one of state law. Cf. Brown v. Western Railway Co. of Alabama, 338 U.S. 294 (1949) (federal remedy cannot be precluded by state rules). As Petitioners have pointed out, under federal law declaratory relief is available after taxes have been paid. Petition at 22.

5. Respondents' contention that the Commerce Clause is not implicated because the items subject to tax were not "in transit when they were taxed," Brief in Opposition at 11, was expressly repudiated by this Court in Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 322 (1977). See also D. H. Holmes Co. v. McNamara, 486 U.S. 24, 27 (1988). The issue of whether a state sales and use tax which fails to grant a tax credit for sales taxes paid in other states violates the Commerce Clause is squarely presented by this case. It should be resolved by this Court, especially in view of the affirmance last term by an equally-divided Court in Ford Motor Credit Co., Inc. v. Department of Revenue, 59 U.S.L.W. 4450 (May 21, 1991).

6. Respondents' attempts to convince this Court that the Vermont motor vehicle purchase and use tax was administered constitutionally only point up the need for a judicial determination of the facts. Cf. Brief

in Opposition at 4 and Respondents' Appendix at 25a-35a. That is what this Court remanded for in the first place. Petitioners will resist the temptation to refute Respondents' evidence here. Suffice it to say they are confident they will prevail at any hearing which meets due process standards.[4]

Respectfully submitted,

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September, 1991

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[4] As noted in the Petition, however, this case could be disposed of by a ruling in favor of Petitioners on their Commerce Clause claim. No disputed factual issues are presented there. See Petition at 27-30. In view of the judicial resources expended and the delays endured to date, such a disposition may be appropriate.